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IMMIGRATION LITIGATION REDUCTION

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UNITED STATES SENATE

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CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

WITNESSES

QUESTIONS AND ANSWERS

SUBMISSIONS FOR THE RECORD

IMMIGRATION LITIGATION REDUCTION

MONDAY, APRIL 3, 2006

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:04 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter, Sessions, and Cornyn.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Chairman SPECTER. Good morning, ladies and gentlemen. The Judiciary Committee will now proceed with our hearing on the subject of judicial review of immigration matters.

The Senate is currently considering legislation on immigration reform. It follows extensive hearings and a markup by this Committee. We have on the floor now what we call the Chairman's mark or the Committee bill. We have proceeded under an expedited schedule where the Majority Leader wanted a bill on the floor on Tuesday of last week, and we had a very lengthy markup on Monday to complete action on the bill, except for the title on judicial review. And we kept that aside until we could make further inquiries to find out what we ought to be doing on judicial review and to hear from experts.

My preference would have been to have approached the entire subject of immigration review with a more thorough analysis, which we have on the hearing process and on the so-called markup where the Committee sits down and goes over the text line by line to figure out what we ought to do. And there are, as you well know, very, very complex policy considerations on this bill at every turn. It is a highly emotional bill. There are those who want only border security, only enforcement, and there are others who want broader reform to accommodate the 11 million people who are in this country as undocumented aliens.

The Committee bill provides to accommodate the 11 million people for a number of reasons, the most prominent of which is there is no way to round them up, detain them, deport them, and they are here. They are undertaking important jobs, and there is a heavy controversy on whether they are taking jobs that other Americans would fill or whether they are taking jobs other Americans would fill if the pay was higher. So there are lots of controversies.

With respect to judicial review, we are considering the consolidation of all of the circuit appeals to the Federal circuit. That has drawn some objections on grounds that it is preferable to have the matters remain in the circuit courts where there are generalists who are at work. There is a very substantial imbalance, as you know, with the Ninth and Second Circuits having many more appeals than the other circuits. There are some suggestions. Judge Becker has made a suggestion that there be created something like the Multidistrict Panel to reassign cases. Judge Newman I understand has a suggestion for temporary assignments. And with you judges here today who have had a lot of experience in the field, we will be able to shed some light on that.

We have a second panel which will take up additional questions as to what ought to be done with immigration judges, whether there ought to be reforms there, the Board of Immigration Appeal, and we will be asking you those questions as well.

We have a practice of swearing in all witnesses, so I hope you will not mind. If you will rise and raise your right hand. Do you solemnly swear that the testimony you will give before the Judiciary Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Judge MICHEL. I do.

Judge WALKER. I do.

Judge BEA. I do.

Judge NEWMAN. I do.

Judge ROLL. I do.

Chairman SPECTER. Thank you. Our first witness will be the chief judge of the Federal Circuit, Judge Paul R. Michel. He has been on that court since 1988, appointed by President Reagan. In the interest of full disclosure, I will tell you that he was my chief of staff before he became a circuit judge. And in the interest of fuller disclosure, I will tell you he was an assistant district attorney in my office in Philadelphia. And in 1967, 1968, and 1969, he was, in my opinion, the most knowledgeable lawyer in America on constitutional procedure in the era of implementing *Mapp* and *Miranda* and lineups, et cetera.

Judge Michel, you have a very extensive biography. It will be included in the record, but we appreciate your coming here today and look forward to your testimony.

Under our Committee procedure, we have a 5-minute rule. To the extent you can accommodate that, we will—Senator Cornyn has just arrived. He used to be a judge. Senator Cornyn, would you care to make an opening statement?

Senator CORNYN. Mr. Chairman, thanks for the opportunity, but I will pass.

Chairman SPECTER. OK. Judge Michel, Chief Judge Michel.

STATEMENT OF PAUL R. MICHEL, CHIEF JUDGE, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, WASHINGTON, D.C.

Judge MICHEL. Good morning, Mr. Chairman. Thank you for the opportunity to testify. It is a great pleasure for me personally to be back in this building and this room.

I testify primarily in my capacity as the chief judge of the Court of Appeals for the Federal Circuit. I am also, as you know, a member of the Judicial Conference and, along with my friend Chief Judge John Walker and five other judges, a member of the Conference's Executive Committee. And indeed, I participated in the drafting of the two Conference letters which have been submitted to the Committee, and I agree with their content.

However, rather than cover the policy aspects that are well covered in those two letters, I thought I could best contribute to the work of the Committee by concentrating on the capacity of the Federal Circuit to handle such a large increase in jurisdiction and caseload.

If I might, I would like to first mention that I think that in many recent news articles and also in some of the letters sent by various people to the Committee, the notion that the Federal Circuit is a narrowly specialized court has been greatly overstated. I saw a news article published as recently as yesterday that said the Federal Circuit does patents and bankruptcy. Of course, it is entirely erroneous. We do no bankruptcy at all, and the patent cases make up a minority of our cases.

I had sent the Committee a letter, and rather than spend more time on the extent to which we are not a narrowly specialized court, I might ask the Committee if the record could include my letter to the Committee of March 24th. It provides details about our actual jurisdiction.

Chairman SPECTER. Without objection, your letter will be made a part of the record, Judge Michel.

Judge MICHEL. Thank you kindly.

Now, with respect to the workload, as the Committee knows, the present annual filings in the Federal Circuit Court of Appeals are about a thousand and a half. If the Chairman's mark were to be enacted into law, that would grow and become something on the order of 13,500, perhaps more, since the immigration petitions for review have been steadily increasing—so a huge, more than tenfold increase.

At present, we have 15 judges, and just to make a comparison, the Ninth Circuit, which has something like a third of the present petitions for review, has 47 judges. We have 15. The Ninth Circuit has 85 staff attorneys. We have four. The Ninth Circuit has over 110 deputy clerks. We have 20. So when you multiply by a factor of 2 to 3 the Ninth Circuit resources, we would need essentially, as I indicated in my prepared testimony, to triple the size of our staff. That would also require the budget to be magnified at the level of 2 to 3 times, and we would also need the equivalent of another courthouse in order to accommodate all those additional staff members.

I should add that even with that very large-sounding staff, the Ninth Circuit, according to reports, has had great difficulty in carrying its one-third or so of the national immigration caseload. I also see that the caseload is rapidly rising, and there is a big difference between how it was measured last September versus now.

Another way to focus on this is how long a ramp-up period we would need. Even if we were given triple the budget, triple the staff, double the space, we do not have the capacity to surge in a

short period of time to absorb that kind of resource. For example, our computer system could not be expanded to support the staff of 400-plus or a caseload of on the order of 13,000 or 14,000. And certainly a transition period would be extensive, running into the order of a year and a half to 3 years, by my best estimate.

Over the weekend, Senator, I tried to calculate the effect on the daily life of a member of our court if this increased caseload were given to us. I am down to 5 seconds, but, in essence, assuming that three-quarters of the immigration cases dropped off on the one-judge review, our workload would go from 240 judge dispositions per year to 1,500, about a 7-time increase. And even counting the three additional judges provided for in the Committee mark, and assuming only 1 hour to do the one-judge review, which I think is probably not an accurate assumption, but even assuming that, the effect on the time allowed to do everything on a case, from reading the briefs, master the case, decide the case, write the opinion and so forth, which greatly decrease. Right now we do about a case a day. So we have 8 or 10 hours on average to do all the different aspects of adjudicating a case. At the assumption of a 75-percent dropoff rate and one-judge review, the 8 hours per case would drop to an hour and a half. And I think realistically we could not even learn the case by reading the briefs in an hour and a half. The briefs always consist of several hundred pages, the records often of thousands of pages. It is just not humanly possible, even with increased staff resources and three extra judges, to keep up with this kind of a caseload.

So I think what would happen would be that the backlog would swell rapidly, and the risk would also be incurred that the quality of the dispositions, both in non-immigration cases and immigration cases, might not be what it should be or what it is presently.

I thank the Committee for the chance to appear, and I would be happy to respond to questions when the time comes.

[The prepared statement of Judge Michel appears as a submission for the record.]

Chairman SPECTER. Well, Judge Michel, what you are saying, in essence, is that it would immediately overload, really swamp your Federal Circuit.

Judge MICHEL. It would, Senator, under any set of assumptions that I have been able to make, because the combined one-judge review and panel caseload would be unsustainable even by 20 judges or 24 judges. It is hard to know the number of judges and assuming all the ratio of support staff that it would take. But it certainly could not be done by 15 judges.

Chairman SPECTER. Well, when you say that you would need a new courthouse to accommodate the workload and the personnel you would have, that is something that cannot be provided overnight or very fast.

Judge MICHEL. Exactly. The staff would have to swell from its present total of 140 by my calculation to approximately 420. So we would need commercial office space or another building about the size of our present courthouse on Lafayette Park, where you yourself have visited, a nine-story modern office building. And it would take a lot of time to get such a building, if one is even available anywhere proximate to our courthouse. That is part of why we do

not have the surge capacity. Even if handed all the money immediately, it would take time to get the office space, time to hire the staff. We would probably have to start an entire new computer system, which would have to be designed, built, tested, and implemented, which, again, would take probably years.

Chairman SPECTER. Thank you very much, Chief Judge Michel. It is a bleak picture, but we want to know what the facts are so we can figure out what to do—try to figure out what to do.

Our next witness is the chief judge of the Court of Appeals for the Second Circuit, Chief Judge John M. Walker, Jr. Judge Walker came to the circuit court in 1989. Prior to that he was district court judge in the Southern District of New York and has been chief judge since October 1st of the year 2000.

Welcome, Chief Judge Walker, and the floor is yours.

STATEMENT OF JOHN M. WALKER, JR., CHIEF JUDGE, UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, NEW HAVEN, CONNECTICUT.

Judge WALKER. Thank you, Mr. Chairman, Senator Cornyn, and members of the Committee. I thank you for the opportunity to appear here. As chief judge of the Second Circuit, I am responsible for one of the two courts that is bearing the brunt of the immigration appeal explosion right now, along with the Ninth Circuit. I do appear today in my individual capacity. I do not speak for the other judges in my court. And I do appreciate also the Committee's hard work on the very difficult issues relating to the whole issue of immigration reform, the national debate that is going on, but also, in particular, the impact of the proposed legislation on the adjudication of these disputes.

For the past few years, I just wanted to give a little background. My court has been receiving immigration appeals at the rate of about 2,500 cases per year. Around a quarter of the cases that are filed nationally come to the Second Circuit. What we thought was a one-time bubble, as the BIA was ordered to clear its backlog in 2002, has now turned into a steady flow of cases, and most of these raise asylum issues. Over 90 percent raise asylum issues. They are fact-intensive cases in which the petitioner is seeking to be relieved of the obligation to return to their home country by virtue of the fact that they claim persecution.

To deal with this backlog that we had and that we currently have and are working on, in October 2005 a special non-argument calendar was set up for asylum cases, and we are adjudicating 48 cases a week on the basis of this calendar, which we call the NAC, N-A-C. And we are doing it with three judges on each case. In the 6 months that it has been in effect, it is reducing our backlog, and we expect to eliminate it in no more than 4 years, maybe even 3 years. In this regard I want to publicly commend Circuit Judge Jon O. Newman, who is here today, who was the principal architect of the NAC Program.

The principal reason, I think, for the current backlog in the Courts of Appeals, and the reason that we have higher expected numbers of cases being remanded are a severe lack of resources and manpower at the immigration judge and BIA levels in the Department of Justice. Only 215 immigration judges process filings of

over 300,000 cases a year. That means a single judge has to dispose of 1,400 cases a year or nearly 27 cases a well, or more than 5 each business day. Immigration judges simply cannot be expected to make thorough and competent findings of fact and conclusions of law under these circumstances. The BIA faces similar pressures. It has 11 members currently and faces 43,000 filings a year. So each judge has to decide nearly 4,000 cases a year, a virtually impossible task.

So I think there needs to be a substantial increase in the number of immigration judges and BIA members, and my testimony specifies in some detail the numbers that I think would be appropriate, basically doubling the numbers.

Turning to Section 701 of the Chairman's original bill, which would take petitions for review out of the Regional Courts of Appeals and put them in the Federal Circuit, with all due respect, I believe that consolidating these appeals in the Federal Circuit would be a mistake for the following reasons.

First of all, it will do nothing to improve the performance and productivity of the IJs and the BIA, which I think is the core problem in immigration adjudications, and which can only be addressed by additional resources.

Second, as has been noted, it will swamp the Federal Circuit with petitions, a ninefold increase at least in its caseload, reducing the time for careful consideration, delaying dispositions and exacerbating the backlog.

Third, it will run counter to the firmly accepted idea of our Nation's relying on generalist judges to adjudicate disputes, and it will also run afoul of the policy of the Judicial Conference, which disfavors specialized courts except in limited circumstances.

It also, I think, runs the risk of politicizing the Federal Circuit, which could affect the reputations, not only of the Federal Circuit but of the judiciary as a whole, as the public and those responsible for nominations begin to view the Federal Circuit as determining primarily immigration cases, and then the views of the judges as pertains to immigration cases, and how they might dispose of such cases, would become paramount in the appointment process.

Finally, I think that the centralization in the Federal Circuit would lose the benefits of having appeals heard in the community where the parties are located.

Now, every circuit judge in the country today is available—if I could continue just for a few minutes, Mr. Chairman.

Chairman SPECTER. Yes, you may, Judge Walker. Proceed.

Judge WALKER. At present, every circuit judge in the country, with the exception of those in the Federal Circuit today, is available to review immigration petitions. There are 70 Federal judges available to dispose of these cases in the Second and Ninth Circuits alone, but even with the proposed expansion of the Federal Circuit to 15 judges, 15 judges would be responsible for the more than 12,000 petitions for review on top of that court's current caseload, and that current caseload is about 1,500 cases a year, as we have noted, as Judge Michel has noted.

The Judicial Conference has long opposed the specialization of the Article III judiciary in favor of using generalist judges to decide cases, and this is a system that has served our Nation well

throughout its history. The executive committee, just last Friday, confirmed that position, and is on record opposing the consolidation of immigration appeals in the Federal Circuit.

At present, judges are not appointed to decide a specific class of cases generally. However, under the proposal, since the overwhelming majority, 90 percent of the docket of the Federal Circuit would be immigration appeals, that would change, and even if done with the best of motives, the appointment and confirmation of judges to the Federal Circuit would inevitably, I believe, tend to focus on how the nominee would be inclined to rule in immigration matters. Should this occur, the prestige of the Federal Circuit Court of Appeals, I think, would be impaired, as would the perception of impartiality that is so critical to the public's favorable view of the judiciary as a whole.

Mr. Chairman, I am also troubled by the provisions of the proposed bill that provide that one judge decide whether the petitioner is entitled to Court of Appeals review. Currently, even under the more efficient NAC procedures of the Second Circuit, each alien's position receives the attention of three judges. But with the hastily administrative records that we are seeing, single-judge gatekeeping review would diminish, I think, the quality of review that these cases receive, and would not appreciably speed up the process, because all of these cases are so fact intensive, that the same staff attorney support would be required, as is the case today, and our NAC calendar is moving expeditiously in handling our backlog, and I don't think a single-judge review process would significantly improve that disposition rate.

Again, I thank the Chairman and members of the Committee again, for bringing to light these issues, and in my view, again, the most single effective way to improve the functioning of judicial review of immigration proceedings is to give the Department of Justice the adequate resources to handle its caseload. I think the present structure of immigration review is really not the problem, and that the solution does not rely in changing it.

Thank you, Mr. Chairman.

[The prepared statement of Judge Walker appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Judge Walker.

We now turn to Judge Carlos Bea of the Court of Appeals for the Ninth Circuit. Prior to coming to the Ninth Circuit, Judge Bea was on the Superior Court of California.

May I add that the Ninth Circuit Chief Judge, Chief Judge Schroeder, has submitted testimony, as has Circuit Judge Kozinski of the Ninth Circuit, as has Judge Posner of the Seventh Circuit. We have also had the submission from the Judicial Conference of the United States.

Thank you for joining us, Judge Bea, and we look forward to your testimony.

STATEMENT OF CARLOS T. BEA, CIRCUIT JUDGE, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, SAN FRANCISCO, CALIFORNIA

Judge BEA. Thank you very much, Mr. Chairman. Good morning, Senator Cornyn. Good morning, Senator Sessions. Good to see you

again. Like Judge Walker, I want to make quite clear that the opinions I am about to express are my own, and do not represent those of the Ninth Circuit, which as you might guess, are on both sides of this issue. I am here to support the Chairman's mark, Title VII of this bill.

My personal experience, if you will allow me, is a little bit unusual. I am probably the only circuit court judge in the United States who went through a deportation hearing as an alien, was deported, and won at the Board of Immigration Appeals. So I have been there and seen it. And also, in private practice, as the Honorary Vice-consul of Spain, I did a lot of pro bono work with Basque shepherds, and went to the Immigration Court and also the Ninth Circuit, so I have a little bit of experience as a lawyer also.

I think the overwhelming need that is addressed by this mark is a need for national uniformity, a national policy. One doesn't immigrate to Idaho or Texas, one immigrates to the United States. We have very important problems which are circuit splits, and they can be in such issues as what is an aggravated felony from one State and what is not; is an order of removal necessary when somebody comes back in the country by an immigration judge, or can you do it by having the agent enforce or reinstate the order of removal? That is an issue which is presently split.

The Supreme Court cannot take enough cases to give us supervision in all areas. What happens with this lack of uniformity is that you get forum shopping. It is very clear, asylum cases, which I agree are 90 percent of our immigration cases, which by the way, in the Ninth Circuit, immigration loaded between 46 and 48 percent of our overall calendar.

In asylum cases the Fifth Circuit in Texas and in New Orleans has had 125 percent rise over the last 5 years. But the Ninth Circuit has had a 590 percent rise over the last 5 years. Now, why is that? The Fifth Circuit grants 9 percent of the Board of Immigration denials by reversing them. The Ninth Circuit grants 33 percent. If I were representing one of my old clients, I would do everything in the world to have him given up and proceed in the Ninth Circuit rather than in the Fifth Circuit. That is the forum shopping which actually exists today as a practical matter.

The review by a one-judge court is not so unusual. We presently have reviews of habeas cases by a one-judge court, the district judge, and if he does not grant it, we have a two-judge court in the Ninth Circuit take a look for certificate of appealability. It is not a new function.

The criticisms that we have had that I have heard about generalists, the idea being that it would politicize the regime of appointing judges, I don't think that the appointing for results, which was talked about, has worked so well in the Supreme Court of the United States, and I don't think it is working in an of the circuit courts either. Judges tend to be very, very independent once they become Article III judges. The idea that the court located in Washington could not give justice throughout the country, I think, overlooked something which is very important. The Federal Circuit is the only circuit under 28 U.S.C. 48(a), which can hold hearings in any of the other circuits and any of the other cities. So they can come out to San Francisco. We have got plenty of courtrooms where

they can have hearings. Plus, one must remember that in our particular circuit, last year we had 4,700 terminations of determinations of immigration cases. We had, of those 4,700, only 9 percent actually reached three-judge panels. We determined the rest of them either by motions or by screening panels of three judges that we did not think were worthy of argument, somewhat like the non-argument calendar.

The idea that Federal judges have no immigration experience, I don't think many of us have immigration experience. I think I am an exception because I had some trial practice immigration experience. Immigration is a very complicated area. It is somewhat like tax law because we keep passing immigration bills, and there are layers. For instance, in asylum, you have asylum, you have withholding of removal, and you have the Convention Against Torture. It is three different acts, three different layers you have to go through in practically every immigration case. And it is a little bit like tax. That is why we have a Tax Court, and that is why we could have a review court here in the Federal Circuit.

The backlog of cases is just growing, and there is an incentive—the backlog is an incentive for appeals. I agree with everything that Judge Walker said about the necessity to beef up the BIA process and the BIA opinions, and I know that is going to be the subject of the second panel so I will not address that.

Some of the letters say that the only way to handle an immigration case is to do it as it is being done now, an immigration appeal. Some of the letters say that the particularized determination, the compassion that is shown by regional circuit court judges cannot be duplicated in a centralized court. I don't think we have a corner on compassion, and I think we can do some of the things which the chairman's mark has indicated and improve the rendition of justice immensely.

Thank you very much.

[The prepared statement of Judge Bea appears as a submission for the record.]

Chairman SPECTER. Well, thank you very much, Judge Bea.

We now turn to Judge Jon Newman, on the Federal bench for 33 years, 7 years on the district court in Connecticut, 26 years on the Second Circuit, had been chief judge for 4 years. And, again, in the interest of full disclosure, Judge Newman and I were classmates at Yale—I will not mention the year—squash partners, and long conversations at a midway point between the two apartments where we lived.

I could tell you more but I will not.

Judge NEWMAN. Thank you.

[Laughter.]

Chairman SPECTER. But I will mention one additional relevant factor, and that is that Judge Newman was a member of the Senate family. He was chief of staff for Senator Ribicoff.

Thank you very much for joining us, Judge Newman. We look forward to your testimony.

STATEMENT OF JON O. NEWMAN, SENIOR JUDGE, UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, HARTFORD, CONNECTICUT

Judge NEWMAN. Thank you, Mr. Chairman, Senator Sessions, Senator Cornyn. It is a great pleasure to be here and have a chance to discuss this issue with you.

I want to touch briefly on three aspects of the proposal: the transfer proposal, the Certificate of Reviewability proposal, and the proposal to increase the personnel throughout the administrative process.

With respect to the transfer to the Federal Circuit, I think it is useful if you think of that proposal as comprehending two very distinct issues: the first is whether there should be centralization at all, as distinguished from leaving the cases in the regional circuits; the second issue is if you decide in favor of centralization, where do you centralize. Those are separate issues.

Like others who have testified and written, I strongly oppose centralization. I say this with all respect to the Federal Circuit. I do not doubt that they are estimable men and women who could handle it. I don't think it is an issue of who has more or less compassion. But never in the history of this country have we put cases involving personal liberty in a specialized court. The country has been served well by two centuries of leaving those issues in the courts of general jurisdiction manned by men and women selected for their broad experience. The Federal Circuit judges were selected in large part for their expertise in technical matters.

Whether centralization is needed for uniformity I seriously doubt. Of course, in any system that is adjudicating thousands of cases, there are going to be a handful of examples of different outcomes. But the basic issue arising in asylum cases is not technical construction of the immigration statute. It is the much more mundane issue of reviewing a finding by an immigration judge and the BIA that the witness, usually the alien, was not credible, and the issue is was the credibility finding supported by substantial evidence. That is the type of thing generalist appellate judges do all the time when we review bench findings of district judges. And I suspect that in the general run of patent cases—I used to try those as a district judge. I don't think there are many credibility issues that come up in a patent issue. But we review credibility findings all the time in asylum cases, and I think it's better to leave those in the generalist court.

The other issue against centralization, of course, is volume. Judge Michel and Judge Walker have given you the numbers, and I will not repeat them, and you have more detail on that from Judge Posner. To put all that volume in one place is a prescription for a train wreck. You are just going to clog the court, or you are going to have to so expand it and gear up its personnel, its staff, and even its building, as Judge Michel says, and at a huge cost. Do you add judges? The current figures I have seen are it is $1 million every time you create a new judgeship: the judge, personnel, staff, support and all that.

So I would strongly urge you not to centralize, to leave personal liberty cases among the regional courts where they have always been in the history of this country. If you are going to centralize,

then I urge you to consider not putting them in the Federal Circuit, whose personnel were not selected for that, but to give serious consideration to an alternative centralization proposal, namely, a panel of immigration—a special panel on immigration appeals drawn from the existing complement of circuit judges throughout the country and/or district judges, if you like, modeled on the FISA Court, with which this panel is very familiar, or the old TECA Court, Temporary Emergency Court of Appeals. Those were courts to handle a group of cases drawn from the courts of appeal, selected by the Chief Justice, and there are other selection mechanisms which you could consider. It would provide one court. It would be based in Washington, if that is where the Department of Justice thinks it is better to litigate. And it can sit around the country if it wants, and it would provide flexibility.

Your bill proposes adding three judges to the Federal Circuit. I think most people think three judges could not possibly handle this problem. But a panel drawn from the ranks of the sitting judges would, A, not cost you any money, which I think is a virtue; and, B, provide you flexibility. If the Chief Justice saw the volume needed judges, nine judges, 21 judges in 1 year, 21 could be drawn. If in the next year the volume was down, only needed 15 or 11, you could adjust the volume. So it offers flexibility. It offers a primarily Washington-based court. It offers generalist judges. And it follows the pattern we have used in the past and avoids a specialized court.

Just briefly on Certificate of Reviewability. We have never in the history of this country allowed one judge to cutoff appeal on an issue of personal liberty in a case that has not been fully reviewed by a prior judicial system. My guess is this proposal was modeled on the COA, the Certificate of Appealability, which applies from appeal on a district court denial of habeas corpus. But those cases, as this panel well knows, are cases that have been fully reviewed by the entirety of a State judicial system and by an Article III district judge. To permit a Certificate of Reviewability there made sense, although it is interesting that almost every circuit uses three judges even to review those. But there has been full review. We have never, never let one judge cutoff review on a case involving personal liberty that has not been fully considered by a full complement of judges.

A last point on the personnel. That is the best part of the bill, if I may say so. You need more IJs. You need more BIA members. You need to go back to the so-called streamline proposal, which proved to be a disaster and burdened all of us with these thousands of cases, many with one-line affirmance opinions which are not the way to handle an administrative process. So you need more IJs. You need more BIA members. And you need the cohort of attorneys that your bill calls for, both in OIL and EOIR and the U.S. Attorney's Office to properly staff it. In short, you need a thoroughly financed, well-funded administrative system to handle these thousands of cases. You do not need to disrupt it by moving all the cases out of the hands of generalist judges. But if you are interested in centralization, then I urge you to centralize in a special panel drawn from the courts of appeals and not put into a specialized court.

Thank you, Mr. Chairman.

[The prepared statement of Judge Newman appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Judge Newman.

Our final jurist on this panel is Judge John Roll from the United States District Court for the District of Arizona, where he has been a judge since 1991, and prior to that time was in the State court system of Arizona.

Thank you for coming in today, Judge Roll, and we look forward to your testimony.

STATEMENT OF JOHN MCCARTHY ROLL, DISTRICT JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, TUCSON, ARIZONA

Judge ROLL. Thank you, Chairman Specter. Good morning, and good morning, Senator Sessions and Senator Cornyn. My name is John Roll. I am a district judge in Arizona. Beginning May the 1st, I will be the chief judge for the district. I speak only for myself at this time. It is an honor to appear before this Committee, and it is certainly daunting to appear as a member of such a distinguished list of witnesses.

I speak in favor of the Chairman's mark in this case. I believe that consolidation would be a good thing. I think it is appropriate. I realize you have received the letter from the Judicial Conference in opposition to the proposal of the consolidation. I would like to touch on just a few points in connection with that.

The letter points out that subject-matter courts are only appropriate where national uniformity is crucial. It would seem that immigration is exactly such a topic.

The written testimony that I have submitted points out several examples of inconsistencies, not only inter-circuit but intra-circuit, in connection with immigration issues. These include how circuits go about evaluating immigration judges' credibility determinations, derivative asylum issues, and retroactivity of deportation orders. There are conflicts inter-circuit and intra-circuit as to these various matters, and there should be national uniformity.

The letter from the Judicial Conference also refers to regional courts that have developed expertise, and I am certain that is true. But if one circuit were to handle all of the appeals from the Board of Immigration Appeals, they would have an expertise unmatched by any circuit that currently hears these matters.

It has also been referred to in the letter the fact that litigants may find that their cases are decided in distant tribunals. I suspect that many litigants already feel that their cases are being decided in distant tribunals when they are heard in San Francisco, for instance, in the Ninth Circuit. But as has already been mentioned, 28 U.S.C. Section 48 would permit the Federal Circuit to go to the busiest cities and to conduct hearings in connection with those matters. It has also been mentioned that most of these cases are submitted on the briefs.

Another reason that is a compelling reason for this particular consolidation is that it would help a severely overburdened Ninth Circuit Court of Appeals. The caseload in the Ninth Circuit is now approaching 17,000 pending appeals, several times what the aver-

age is for the other circuits. That represents 28 percent of all of the pending Federal appeals in the United States of the 12 geographical circuits. Its population is one contributing factor to this. The population in the Ninth Circuit is approaching 60 million people, one-fifth of the United States. It consists of nine States, a territory, and a Commonwealth. The other circuits average four, and, of course, one of those nine States is California. This shows up in a number of different ways, and I will just pick two examples. One of them is the Ninth Circuit is the slowest circuit in the United States in decisional time. That is the time measured from the time of the filing of notice of appeal to the time of disposition. And that is the time that matters to the litigants.

The Ninth Circuit now takes 16.6 months per case. The average for all of the circuits, even when you add in the Ninth Circuit, is 12.1 months. The next lowest circuit is 2.5 months faster than the Ninth Circuit Court of Appeals.

Also, the Ninth Circuit is the most reversed circuit, and perhaps that would be understandable because of the volume of cases that the Ninth Circuit hears. But the Ninth Circuit is the most unanimously reversed circuit by the Supreme Court.

Since the White Report was issued in 1998, the Ninth Circuit has unanimously been reversed by the Supreme Court 59 times. I have included in my submission in conjunction with my written testimony, Attachment G, which lists those 59 unanimous reversals by the Supreme Court. I have included, as Attachment C, the list of Administrative Office records that show that the Ninth Circuit is the slowest circuit, and Attachment A reflects the caseloads among the various circuits.

The Chairman's mark would result in about 6,500 cases—assuming the pending cases were transferred—being removed from the Ninth Circuit Court of Appeals. This would be of benefit to a circuit that is severely overburdened.

Thank you again for the opportunity to appear before you.

[The prepared statement of Judge Roll appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Judge Roll.

We now proceed to the questioning from the Senators, and our practice is to limit it to 5 minutes, but we will obviously have more than one round today as we go through the process.

Judge Newman, would your suggestion be that the new court of Washington, presumably, would be full time for these circuit judges, or would they retain responsibilities in the circuit for regular assignment as well?

Judge NEWMAN. I think that would depend on how many were initially chosen. If only three were chosen, I think they would be pretty much full time. If a large panel were chosen along the models of FISA, then I think they could retain a substantial caseload in their own circuit.

Chairman SPECTER. Don't we face a similar problem to that that Judge Michel has stated, a courthouse, computer system, staff, if we are going to put all these—

Judge NEWMAN. I don't think so. For example, if one, two or three judges were selected from the Second Circuit to staff such a panel, I would think they would use the staff resources of the staff

attorneys office in New York who are already there, who are writing memos on these cases, scores of them every day. I don't think they would move to Washington. The judges could come to Washington for the hearing, or the hearing could be held elsewhere, or it could be done by closed circuit television, as we now do with lawyers all over the country. There are many flexible ways to handle the logistics of this.

Chairman SPECTER. What do you think of Judge Becker's idea to reassign cases to have some—an analogy to the Multidistrict Panel, where you take a look at the Ninth Circuit is overburdened, the Tenth Circuit has very few, and we assign some cases there. What do you think of that?

Judge NEWMAN. Between circuits?

Chairman SPECTER. Yes.

Judge NEWMAN. Well, of course, I think you would have to change the venue provisions. You would want to discuss—

Chairman SPECTER. You have that in any event.

Judge NEWMAN. You would, you would. You would want to discuss with the bar whether the lawyers from one part of the country want to be transferred to another part of the country.

Chairman SPECTER. Well, if you have it in Washington, they are going to be traveling.

Judge NEWMAN. They would, yes. Oh, I thought you meant just from the Ninth to the Tenth, and send them—

Chairman SPECTER. No, no. Some administrator or panel would take a look at the imbalance. Say the Ninth Circuit was overburdened, say the Second Circuit was, another circuit is not.

Judge Walker, you have your hand up.

Judge WALKER. There is an option here, and that would be using a panel like that to, in effect, allocate cases to the circuits on a pro rata basis. Every circuit has a—this does not address, of course, the uniformity question, but it does address the backlog unevenness that would occur, that is occurring now. And you could take into account the pro rata amount of decisions that each circuit is making in a general way on all their cases, and then simply assign the immigration cases to those circuits on that basis.

Chairman SPECTER. You think that would be a practical way of handing it?

Judge WALKER. I think it would a practical way of handling it.

Chairman SPECTER. I was—

Judge WALKER. I have one other comment if I could, and that is with regard to Judge Newman's, in effect, fall-back position, which would be this panel. It would have the virtue of creating a uniform body of law because it would be a separate panel that would be presumably subject to rules of precedence that would apply to that panel, so that notwithstanding—if I am a Second Circuit Judge, and I have ruled or our court has ruled in a certain way, when you are transferred to the panel, the immigration panel, you would be governed by rules of law that would apply to that panel, as if it were a separate court.

Chairman SPECTER. I am going to want to explore with you, but not on the record at this moment, logistically how we would do that. I was struck by your comment that going to the Federal Circuit, you would be politicizing.

I will ask you first, Judge Walker, and then Judge Michel, why do you think it would politicize matters, and then I will let the defense speak.

Judge WALKER. Well, I don't particularly think that it necessarily would. I just thought that—I do believe that there is always a risk when you take a highly politically charged issue and put it into—

Chairman SPECTER. What is there political about the individual cases? There is a lot of politics involved on whether we are going to have a guest worker program, but when an individual matter comes to the circuit court, what is so political about that?

Judge WALKER. There's nothing terribly political about that itself. It would really be a question of—courts get reputations. Are they more or less inclined to favor one side rather than another. That would be the only issue that would come up.

Chairman SPECTER. Chief Judge Michel, if you do draw this assignment, what do you think about Chief Judge Walker's concern about the politicization?

Judge MICHEL. I really have no way to evaluate it. It depends on the Justice Department, the White House, and the Senate on confirmations. It seems to me it's hard to know.

There is a danger if the court becomes a 90 percent plus immigration court, that immigration predictions will play a significant role in selection of judges. So there is some risk. How to quantify it, who knows?

Chairman SPECTER. The red light went on during Judge Michel's answer. You are permitted to answer. The red light just governs the questioner.

Senator Cornyn, under the early bird rule.

Senator CORNYN. Thank you, Mr. Chairman.

I would like to express my gratitude to the panel for being here and helping us figure this out. I think all of you have made a valuable contribution trying to figure this difficult issue out. It strikes me that probably no judge would like to sit, get up in the morning and go to work and decide immigration appeals from start to the end of the day, and do that day after day, 365 days a year for their entire tenure, and I think there is something to be said for avoiding judicial burnout. I would also tend to agree that there is virtue in the generalist judge who brings a variety of experience to decide individual cases.

But here it strikes me we are trying to figure out how do we achieve the value of uniformity and predictability and the expertise that judges would bring to these appeals that would allow us to handle such a high volume, and to do it in a shorter period of time than is done now.

Mr. Chairman, I am glad that we are also talking about the additional staff that would be necessary. These judges would not be the only ones looking at the case. In fact, every judge depends a lot on the staff to prepare the case for their review, and I think if we are going to make this massive immigration reform bill work, we are going to have to make sure at all levels, whether it is the Department of Justice or the judiciary, or through Department of Homeland Security, that the staff is there to process the huge caseload.

Let me turn to—Judge Walker, you mentioned that you thought the alternative to the proposal before us would be to make sure

that the Department of Justice has adequate resources. Would you see that as a complete solution, and if so, would you explain that, please?

Judge WALKER. Yes. Well, part of the backlog, the real reason for the backlog I think can be traced back to the streamlining decisions that have occurred in the Department of Justice, which are understandable given the huge backlog that they have, and that is, the idea that a single BIA judge can effectively decide an immigration appeal by affirming without opinion. So that streamlining procedure has led to a push on the part of the litigants to have their cases now decided in the Courts of Appeals, instead of in the administrative agency. So the Court of Appeals becomes the first effective review of the immigration judge's decision.

With that, there has been this burgeoning of cases, and in addition, we're seeing, with the streamlining and the burgeoning of cases, that not only are more cases coming through the BIA at a faster rate, but more—but a higher percentage of the cases that are pushed through the BIA are being appealed than was the case before. So it's a ratcheting on two different levels, and that's what explain, in my view, this huge backlog and flood of immigration cases that amount to now 12,000 a year.

So that if we go back, just to answer your question again, if we can go back to basics and see that the BIA and the IJs have sufficient resources, then the issue will basically be litigated at the agency level which is where it should be litigated.

Senator CORNYN. That sounds to me like that would be a valuable thing to push the cases down to be decided at the lowest level of the administrative process they could be without the necessity of getting circuit court judges involved.

But would you agree with me that if you could get greater uniformity of results, that would have a tendency to decrease the number of appeals, and thus, make the problem more manageable?

Judge WALKER. I think that to some extent, that is true. Also, I think though that the number of appeals depend upon the backlogs that have been generated, so that if you have—and that's the venue provision that we're talking about. Currently, the venue provision is tied to the place where the immigration judge renders his final decision. If it's the Ninth Circuit, then it's there. If it's the second Circuit—and a lot of these litigants have connections to the Ninth Circuit or reside in the Ninth Circuit or the Second Circuit. In the Second Circuit we have a huge number of immigrants of Chinese national origin, and they congregate in New York. So that is another reason why cases are coming to particular circuits.

And then once they come to particular circuits, and the backlogs develop in the particular circuits, then that becomes a desirable place for future litigants to file their cases because they'll be at the end of the queue, and the longer they're at the end of the queue, the better off they are, because the name of the game for them is to remain in the country.

Senator CORNYN. Mr. Chairman, I am intrigued by Judge Newman's idea of an analog to the FISA Court. It seems to me it strikes an interesting balance between the need for uniformity, yet sort of an alternative to dumping all of the cases on one court.

If I may, Judge Bea, you had a comment, I believe on the question of—

Judge BEA. Yes. I quite agree with what Judge Walker said regarding the attractiveness of the appeals process to the alien who wishes to stay here. The bigger the backlog you have, if the alien could be put at the back of the line, he can wait out changes in legislation such as are happening at the present time. Also there may be changes in his personal circumstances that would help him in getting a cancellation of removal.

So while it is absolutely necessary to better the Board of Immigration Appeals—and I think on that we're all in agreement—let's not think that that's going to stop the appeals going to the Courts of Appeal. When there is greater uniformity and the sure prospect of a denial, that might help.

Chairman SPECTER. Thank you, Senator Cornyn.

Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman, for wrestling with this important issue as we deal with, I think, 300,000 plus appeals a year. It is obvious that this is a massive undertaking and it needs to be given a great deal of thought. Weaknesses in any part of the system can allow problems to occur, increase appeals in a way that is not legitimate, and drive these numbers to an even greater degree.

I guess, Judge Bea, you were saying that to the extent to which you had a system that rule promptly and consistently with predictability, and a litigant knows that their case, based on the consistent law of the circuit or the court, is inevitably weak and will not prevail, that they are less likely to appeal in the first place?

Judge BEA. They should, that should work. When you know that your chances in the Fifth Circuit are going to be one third of what they are in the Ninth Circuit, then there is an incentive, obviously, to give up, or have your hearing in the Ninth Circuit. If there were uniformity of result or of appeal, then you would think that there would be less appeals from the Board of Immigration Appeals.

Senator SESSIONS. There is still a fairly low standard for this certificate in the Chairman's mark. I mean, all the petitioner would need to do to establish a petition for review would be a prima facie case; is that right, Judge Walker? So it is still not an overly high standard to get a hearing, a full hearing.

Judge WALKER. My understanding is that that is true. If it's just—and I understand there's been debate about what the standard would be. I am not sure exactly what the Committee is thinking of at the moment, but if it's a prima facie case, that's true. The problem—

Senator SESSIONS. That is the language in the mark.

Judge WALKER. That's currently the mark. But the problem is, as Judge Newman has pointed out, that these cases really don't—really turn on credibility issues, so they're fact intensive, and a prima facie case could be made out by the alien, but then you would have to assess credibility, and whether the IJ has really focused on credibility in reaching that determination, that there was no merit to the case. So that is going to require essentially the same investigation by the judge in reviewing the case as currently occurs.

Senator SESSIONS. Judge Michel, on the caseload per circuit, per judge in a circuit, your circuit is one of the lower; is that correct?

Judge MICHEL. Yes, it is, Senator, and we struggle to stay current and deal with the massive patent and trade and contract and personnel cases that we have in very large numbers.

Senator SESSIONS. Is it the D.C. Circuit that is lower per judge than you are, or are you the lowest in the circuit?

Judge MICHEL. They're very similar. They're very similar annual case filings, similar caseloads per judge.

Senator SESSIONS. I thank you for your willingness to consider this, and respond appropriately.

We are in a situation in our country that the immigration legal system is not working. As a result the immigration has become more and more illegal. In the whole system, there are a host different problems that arise in a whole series of different areas, and in almost each one of those areas we are not functioning well. So I would salute the Chairman for thinking creatively to try to make our court system be able to respond effectively. At some point if people oppose every single process reform necessary to make this system work, we are never going to make it work. And my observation has been that anytime someone comes up with an idea that might actually work in the real world and relieve the stress on the courts or the border or the workplace, that turns out to be controversial. So it is a difficult thing, and I look forward to studying this carefully.

I do note, Mr. Chairman, that all of our circuits carry a pretty good number of immigration cases, and one of the principles I have observed as Chairman of the Courts Subcommittee is that most of our courts do not want to keep adding more and more judges and getting larger and larger because it impacts their collegiality and ability to function. And they would like to keep it slower. They complain about too many Federal laws creating too many causes of action. That stresses the courts.

So I would think that from that point of view—Judge Roll, you might comment on it—it could relieve some pressure to make the circuits larger and larger. But with regard to the Ninth Circuit, do you think this would impact your view that the court still would be too large to function effectively if it took these cases out? In other words, one of the issues at the Ninth Circuit is the caseload is heavy. It is not the heaviest per judge in the country, but it is heavy. And how would this impact your view about division of the circuit?

Judge ROLL. Well, it wouldn't change it. I think that there would still be compelling reasons for a circuit split. I think that the best of all worlds would be the Chairman's mark coupled with S. 1845. And I say that because just this alone won't change some of the factors that are just present in the Ninth Circuit. You will still have a fifth of the population in the Ninth Circuit. That is going to generate significant caseload.

The Ninth Circuit has 28 active circuit-authorized judgeships and needs seven more. That is why they have to have the limited en banc, which is structurally flawed, and Justice O'Connor pointed that out in her letter to the White Commission in the summer of 1998.

If this were to be adopted, the Chairman's mark, along with the proposal to split the Ninth Circuit, it would result in a new Ninth Circuit consisting of California, Hawaii, and the islands that would have 60 percent of the judges and 60 percent of the caseload, and the new Twelfth Circuit would have 40 percent of the caseload and 40 percent of the judges—a parity that was discussed at a previous hearing in October of last year concerning the disparity that might exist if just S. 1845—

Senator SESSIONS. Well, we better not go too much into all of that.

Judge ROLL. All right. Thank you.

Senator SESSIONS. We could have a long discussion. But thank you for your perspective.

Chairman SPECTER. Judge Newman, would you care to respond?

Judge NEWMAN. Yes, I just had a couple of words on the uniformity issue. Sure, there are some circuit splits, but there are examples of circuit splits on every issue you can mention. In the aftermath of *Booker* in the Supreme Court, the circuits were all over the lot. You could make the argument that any category of cases should be centralized in order to avoid uniformity. We have never gone down that road wholesale in this country. I don't think we should.

Second, to think that straightening out circuit splits on the statute would decrease the appeals I think is an illusion, and I will tell you why. They do not appeal because they want the benefit of a construction of the statute. They appeal because they are challenging the credibility finding. That is the dominant issue in almost all the cases. And it does not matter how you read the statute. You are always going to have a credibility finding by the IJ, and the alien and his lawyer are going to say it is not supported by substantial evidence.

Third, to the extent you are worried about lack of uniformity, if instead of putting these cases in the Federal Circuit you went to some sort of a special immigration panel drawn from the sitting judges of the Article III courts around the country, they could resolve any disputes by either a full en banc procedure or a mini-en banc procedure following the Ninth Circuit model; or if you wanted, you could even have a special panel that only resolved disputes, which was the proposal Chief Justice Burger made many, many years ago to resolve inter-circuit disputes.

So there are ways to resolve statutory conflicts without moving all these cases wholesale to one court. But if you want to centralize, please centralize in a court drawn from the existing cadre of personnel. We have never done it differently in the history of this country on issues of liberty, and to do it into one court and overburden it will cost you a lot of money and create a huge logjam.

Thank you.

Chairman SPECTER. As we begin the second round, I am glad to see the clock is reset at five.

Judge Newman, following up on that idea, the thought of having a court below the Supreme Court resolve circuit splits has never taken hold. But there might be a little narrower ground here on uniformity by utilizing a special panel, perhaps of five circuit

judges, to resolve the split, so that if we did not go to the Federal Circuit, we would be able to maintain the uniformity factor. Do you think that is a practical way to handle it?

Judge NEWMAN. Yes, I think that is one of the ways to handle it. If you want to centralize all the cases in the court, then I would suggest, as I said, centralize them all in a broad panel drawn from the existing ranks, staff with—

Chairman SPECTER. Well, I am thinking—

Judge NEWMAN. If you just want to do uniformity, if that is the focus, then authorize the Chief Justice to designate a panel of five, seven, whatever number seems appropriate, to resolve inter-circuit conflicts.

Chairman SPECTER. Well, I am thinking about the possibility of reassigning among the circuits in order to have it spread out better, but then to solve this issue of uniformity, where we are looking to the Federal Circuit or one circuit to have uniformity, to create a special panel of five judges to sit en banc or seven.

Judge Michel, I was surprised to find that after an immigration judge decides a case and the Board of Immigration Appeals affirms, the Attorney General has the authority to set that aside. We questioned Attorney General Ashcroft on that subject at substantial length, and the best answer that the Department of Justice could give was that it is very infrequently used.

Do you think that it is sound to leave with the Attorney General the authority to overrule the immigration judge upheld by the Board of Immigration Appeals?

Judge MICHEL. Well, Senator, there is an analogue in trade law, where the President can overrule the decisions of the International Trade Commission for broad reasons of world economics or foreign policy.

Chairman SPECTER. Well, that is the President, and that is a foreign policy implication.

Judge MICHEL. Well, it seems to me the Attorney General has the responsibility for the employees of the Justice Department who make up the immigration judges and the immigration board. So it doesn't seem to me particularly anomalous. It is apparently not used often. There is some dispute about the extent to which it should be reviewable by an Article III court of appeals. But it doesn't seem to me that it is a big factor in these 43,000 decisions and the 30-plus-percent appeal rate that is now flooding all of the Federal appeals courts.

Chairman SPECTER. But you would not let the Attorney General overrule the circuit court?

Judge MICHEL. Certainly not.

Chairman SPECTER. OK. Well, I want to come to the composition of the immigration judges, which is very much on our minds, and I want to start with you, Judge Roll, on this question. We are considering having, first of all, a substantial increase in the number of immigration judges, about 214 now, to go up by 100 over 5 years. And our thinking to give them greater independence is to have them appointed by the Director, a newly created position, on consultation with the Attorney General where they have to meet minimum standards and be ranked by the Merit Systems Protection

Board and be fireable for cause subject to review by the Merit Systems Protection Board.

Considering your experience in this field, do you think that would be an improvement on the selection and composition of immigration judges?

Judge ROLL. Mr. Chairman, I think that the immigration judges have an enormous caseload that they attempt to address, and they do the best that they can under very difficult circumstances. I think anything that could be done to increase their number, to increase the pool of individuals, the qualifications, all of that would be useful. But there are obviously—

Chairman SPECTER. But how about the issue of giving them a little more independence from the Attorney General?

Judge ROLL. Rather than venture an opinion on that, and I think that it may certainly have something to commend itself, I would rather defer to the other members of the panel as far as—

Chairman SPECTER. Judge Bea, what do you think about a little more independence for the immigration judges?

Judge BEA. I am always in favor of independence for judges.

[Laughter.]

Chairman SPECTER. I am, too.

Judge BEA. And I think it is a very good idea. As someone who has been before immigration judges, I quite agree they are overburdened, they have too much work, we need more of them. But nothing helps more, I think, for a judge to know that he is not beholden to any particular district attorney or U.S. Attorney or Attorney General. I think it would help. And I don't know what the position of the administration is on this bill, but it makes a lot of sense to me.

Chairman SPECTER. Senator Sessions, round two.

Senator SESSIONS. Well, it is an executive function primarily to enforce the laws and determine these matters and make decisions, and having been in the Department of Justice quite a long time, you realize you are an executive branch function. Ultimately, we do provide judicial review to make sure that the executive has conducted themselves properly in handling the laws that are passed. So I am not confident that this is the correct way to do this, to remove it from the executive branch. And then we want to know, well, why don't you fix it? Why isn't it working? And nobody is responsible. Everybody blames somebody else. At least when the executive has the responsibility and the authority, you can hold them accountable.

Well, I don't know, Mr. Chairman. I will just wrap up and say I think uniformity would be good, and we could attain that by this court. I believe we could enhance the speed of disposition, which in itself the delays can encourage appeals for the reason Judge Bea suggested. Many times a delay could be advantageous to someone. And the Ninth Circuit, who is doing most of the cases, has the biggest backlog and the longest delay of any other circuit.

I do think that a good case has been made that we need more immigration judges that when the cases hit the Federal courts, they are more and better prepared and more thoughtfully put out.

With regard to liberty, I take very seriously liberty in the United States, but I think these are somewhat different than what we

would normally consider liberty cases. A person wants to come into the United States, they do not have the constitutional right to enter the United States, and it is not really a denial of liberty to say you do not quality to be able to come into the United States. But they certainly are matters of great import and need to be treated with great care.

Thank you for this panel.

Chairman SPECTER. Thank you very much, Senator Sessions.

With respect to the Board of Immigration Appeals, there has been a lot of dissatisfaction expressed from the one-line opinions and the reduction of number. The Chairman's mark increases the number to 23, and provides for three-judge panels, and opinions to be written.

Judge Walker, what is your evaluation of the current system with respect to placing an additional burden on the circuit courts which have to review them?

Judge WALKER. Mr. Chairman, if the one-line orders are removed from the picture and the streamlining process is eliminated so that three-judge panels are deciding it, and more resources are given to the BIA, then the Courts of Appeals will have much more confidence in the BIA's determination, and it will shift the first review from the Courts of Appeals, as it presently is now, back to the BIA, which is where it belongs. So I totally applaud this effort on the part of the Chairman, on the part of you, to give the BIA adequate resources and ask them to do their job of deciding these cases and doing so by written opinion. It will make a big difference to the Courts of Appeals.

Chairman SPECTER. You talk about more confidence. If you have an opinion, do you have better analysis, do you have more—

Judge WALKER. We don't have confidence, frankly, that the BIA has really looked at the case. I mean, even though they've reviewed, they're told—they affirm without order, but we look at the numbers, the drastic numbers that they have to deal with, 4,000 cases per judge under the current system per year, which, as I pointed out, is a huge number per day, 80 per week or something of that sort, and so one really gets the sense that we are the first line of review for these cases.

Mr. Chairman, if I could also point out the issue, or speak to the issue that you mentioned about the independence of the IJs. I am not sure that a lack of independence is a problem. I don't have the specific numbers here, but I was surprised to learn that a large number of cases result in asylum being granted by the asylum officer before it even gets to the IJ, and then after it gets to the IJ, a high percentage, about, as I recall, some 30 percent are granted asylum by the IJs. We never see those cases. So a high percentage of cases—and I think that it would be useful to get these figures—result in asylum being granted before the cases ever come into litigation.

The cases that we see, of course, are the ones where the IJ is denied asylum, usually based on a finding of lack of credibility on the part of the petitioner, and that the BIA has summarily affirmed. And then it comes to us, and we just review the record to see whether the IJ had substantial evidence for the credibility determination. That's the way these cases break down. But there are

a whole lot of other cases that we never see, and I think we need to factor into this. And if that's the case—

Chairman SPECTER. On those cases which you do not see, do you think you should see them?

Judge WALKER. No. I'm not saying we should see them. Nobody's appealed them. I'm saying we don't see them because the IJs have granted asylum, and they don't come to us when the IJs have granted asylum.

Chairman SPECTER. Do you sense that the decisions on asylum, for example, are decided by and large correctly by the immigration judge?

Judge WALKER. Generally speaking, I think they do a good job, yes. I mean the only time it is an issue is when we can't really tell how they went through the process, but in my view, the IJs are doing a good job of the cases that I see. When they're denying asylum, I think that in most cases that is a correct decision.

My point goes to the question of independence. It seems to me that the IJs are exercising independence if they are granting asylum in some cases and denying asylum in other cases. They're looking at the cases as any judge would, taking an independent look at the facts, and deciding it under the law.

I don't see, and I would never suggest, frankly, based on anything that I've seen, that the Attorney General is overbearing in terms of the way the IJs are deciding the cases, that somehow pressure is being put on the IJs to come out a certain way.

Chairman SPECTER. Judge Bea, would you try to comment on that?

Judge BEA. In my own particular case, I had about a 12-page BIA decision, which was marvelously well reasoned and came to a terrific result.

Chairman SPECTER. You won that case.

Judge BEA. I won that case. Now, that doesn't happen anymore, and the result is we get the one-line affirmance. And instead of having a three-judge panel that has analyzed the issues and gone to the one issue on which the case turns, and then you can check the record to see if that is correctly decided, we get a one-line affirmance and we have to take a look at the whole record below, and sort of fish through to see if there are any issues worthy of appeal.

The cost is in time and delay, and I'm very conscious of the fact that 46 to 48 percent of our cases in the Ninth Circuit are immigration cases. If those were reassigned either to the Federal Circuit, or under Judge Newman's proposal, to a panel, that would be a sea change as far as the Ninth Circuit would be concerned.

Chairman SPECTER. Judge Newman, we hear complaints from time to time about various judges not Article III judges, who may be following the administration wish on Social Security cases or on immigration cases, and there has been a periodic push to have more independence along these judicial lines, so-called judicial lines, where they are not independent. It seems to me, when we are taking a look at rewriting the immigration laws, this is a chance for us to take a look and make some changes to the immigration judges. Do you think some modification would be desirable to grant greater independence to the immigration judges?

Judge NEWMAN. I'm not certain. I think Judge Walker makes a very strong point, that taking the administrative process as a whole, that is to say, the asylum officer, then the IJ, then the BIA, the outcomes are sufficiently varied. There's a very substantial grant of asylum along with the cases of denial.

I think the outcomes of the whole process are such that it would not be entirely fair to suggest that that process is tilted against the asylum applicant. There are some individual cases that are, frankly, outrageous, and they're being reversed, but as a total process, I think it's working reasonably well.

This isn't—as Senator Sessions pointed out, this is an executive branch function. The Attorney General has this discretion, and whether that discretion should be exercised through IJs and BIAs that are structured within the Department, or structured outside the Department, it seems to me, frankly, is an executive branch decision that I, as an Article III judge, ought not to get into. I think that's an executive branch choice, appropriate for the Senate to get into it. I don't think I ought to, but I do think the outcomes do not cry out for a fundamental change.

Chairman SPECTER. Judicial review is not an executive function.

Judge NEWMAN. No. To the extent it is review—and that's why I think everyone on this panel agrees that beefing up the capacity of the administrative process, giving them the number of personnel, and then giving the Department the number of attorneys to properly represent the interests of the United States, that is appropriate for us because we will get better reasoned decisions.

Chairman SPECTER. Well, the Board of Immigration Appeals is a level of judicial review.

Judge NEWMAN. Well, it is, but it's within the Department of Justice.

Chairman SPECTER. Well, it is now, but should it stay there?

Judge NEWMAN. I really hesitate, as a member of the judicial branch, to advise the executive branch how it should be organized.

Chairman SPECTER. How about advising the congressional branch, Article I?

[Laughter.]

Judge NEWMAN. I think you have plenty of knowledge, experience and expertise to make those judgments yourself.

Chairman SPECTER. That is the first time in years that I have disagreed with you, Judge Newman.

[Laughter.]

Judge NEWMAN. I am so concerned about Article III judges maintaining their independence as an Article III branch, and one way to do that is to not meddle even with advice, invited as it is, in the affairs of the executive branch. If we have a case, we will rule, but I don't think we ought to be telling them how to structure the executive branch, at least that's my view. I don't quarrel with anyone else doing it, I just prefer not to.

Chairman SPECTER. Well, but the Congress is wrestling with the problem as to what is fair, what is just, what is appropriate?

Judge NEWMAN. And you are the political branch, and it's quite appropriate for you to do it. We're not.

Chairman SPECTER. But you have had the experience. We have not. You have seen these cases. We have not seen these cases.

Judge NEWMAN. We have told you our view of the cases. Our view of the cases, as Judge Walker says, is that right now the totality of the administrative process, that is, asylum officer, IJ and BIA, is handling these cases without a pronounced tilt either way.

Chairman SPECTER. Judge Bea.

Judge BEA. I would agree with what Judge Newman said. I think when you get into the trial record, which we have to in reviewing the IJ's decision, because in a one-liner from the BIA, we look at the last reasoned decision which is the IJ. I haven't been able to see any particular tilt. I agree with Judge Newman that once in a while you get a bizarre result, and that's why there's an appeal process. But I'm only speaking toward my general favor of judicial independence, whether it's Article III judges or any judge.

Chairman SPECTER. Aside from the asylum cases, what are the other principal issues which the immigration judge considers and BIA considers?

Judge BEA. Well, besides the asylum cases you have the removal cases which are caused by a person being removed because of a prior aggravated offense—prior aggravated felony. The question is, is this person, who is a legal permanent resident, removable because he has committed a crime which is, by Federal definition, a removable offense?

And then there is—but I have to agree that right now we're doing almost nothing but asylum cases. Now, asylum cases also break down not only into credibility issues, but what is persecution? Is it persecution to have discrimination but not incarceration? Is it discrimination to have a particular controlled birth policy, which now we have legislation on that issue? Those are the issues we are principally involved with.

Chairman SPECTER. Senator Sessions, do you have any further questions for this panel?

Senator SESSIONS. I thank the judges for their thoughts about this process, because, as I see it, it's a classic executive branch matter. They must comply with the laws passed by Congress. They must follow the law in how they determine whether a person should enter or not be allowed to enter this country. They must not abuse their discretion in making credibility choices or other matters, but you give some deference to the administrative procedures in making those decisions. And it is from that that these appeals are all coming.

I mean we have had the process of administrative review and then a final decision is then made that the applicant does not qualify for the immigration benefit they desire, and now they are appealing on the basis either the law was not followed or the judge who made the decision, abused discretion in some fashion. I think that is the proper way to do this because now we can blame the President if it is not working. Somebody is accountable. He can be blamed, I think, for not asking for enough judges. That is one thing he can be blamed for, and if he is not responding effectively to a backlog or we are not getting adequate opinions.

So I think I am dubious about making a change from the Department of Justice. It seems to me that is the normal way we would do these things, and we should probably leave it right there.

Chairman SPECTER. Thank you very much, Senator Sessions.

One final question, Judge Michel. Senator Sessions thanked you for your consideration of the Chairman's mark. Are you considering that? I know you are a good soldier, but I would be interested in your own thinking as to whether it is a wise idea, and part of that is the impact on the Federal Circuit on your other jurisdiction.

Judge MICHEL. Right. Senator, the flip side of Judge Walker's comment about judges for the Federal Circuit being selected on the basis of how the selector would predict they would rule on immigration decisions and asylum grants would be, I fear, could you get good contract lawyers, good personnel lawyers, good patent lawyers, good claims lawyers, good fifth Amendment taking lawyers? We have many cases like that. Tax lawyers, could you get lawyers interested in serving on the Federal Circuit if the diet, which Senator Sessions and Senator Cornyn pointed out, was 90 percent plus immigration cases? I would be very worried that you could not get top lawyers in any of those varied areas with the diet being 90 percent plus immigration cases.

The other thing I would like to say to the Committee is that there is a underlying premise, as I sense it, in the idea of a certificate of reviewability that there are shortcuts here, and I agree with what all of my fellow judges have said, but I want to reinforce one aspect of it.

My own experience in personnel cases, which for most of the quarter century life of our court have actually been our largest single caseload, not patent cases, personnel cases. They all turn on credibility. They are all reviewed under the substantial standard of review, just like the immigration cases are. And in every case the only way that a single judge or a panel of judges can make a reasoned, intelligent, reliable decision, is to read the testimony, read the opinion, if there is one, of the fact finder, read the primary documents in the record. It is a laborious painstaking process. There are no shortcuts. I think it's entirely illusory to think that these 12,000, 13,000, soon to be 14,000 cases per year can be handled on a shortcut basis either by staff or by judges. You have to read the whole file.

Chairman SPECTER. Thank you very much, Judge Michel, Judge Walker, Judge Bea, Judge Newman and Judge Roll. We will just take a moment or two to thank the panel, and then call Panel No. II, Mr. Cohn and Mr. Martin.

[Pause.]

Chairman SPECTER. The Judiciary Committee will now resume with Panel No. II, and our first witness is Mr. Jonathan Cohn, the Deputy Assistant Attorney General in the Civil Division. Mr. Cohn is a graduate of the University of Pennsylvania, bachelor degree, summa cum laude; Harvard Law, magna cum laude; and was primary editor of the Harvard Law Review.

Thank you very much for joining us, Mr. Cohn, and we look forward to your testimony.

STATEMENT OF JONATHAN COHN, DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. COHN. Thank you, Mr. Chairman, and members of the Committee. Thank you for allowing the Department to testify here today.

I think we can all certainly agree that the immigration system is in dire need of change, and thus, the Department looks forward to working with the Committee in developing the most appropriate and effective solutions.

Today, on behalf of the Department, I would like to address two particular sets of potential reforms. First, the provisions that were in Title VII-A of the Chairman's mark, which would help reduce immigration litigation in the Federal Courts nationwide, and second, Title VII-B of the mark, which would effectively render the Executive Office for Immigration Review, or EOIR, an independent agency, unaccountable to the executive branch.

The Department strongly supports most of VII-A and commends the Chairman for including it in his original mark. We cannot, however, support VII-B, because it would undermine the executive branch's ability to control the border and effectuate immigration policy.

If I may, I will start with VII-A. By way of background, since 2001, there has been a 603 percent increase in the number of immigration appeals filed by aliens in the Federal Courts, often without a serious argument, and simply to achieve delay. This flood tide of cases presents a critical problem for the Department, the courts and the rule of law.

First, the cases impose and intolerable drain on resources, requiring attorneys throughout the Department to put aside other critical work, and instead turn to writing immigration briefs.

Second, the cases impose delay on the courts because of the growth in litigation. The Second Circuit, for example, now takes over 2 years to decide the average immigration appeal. As a result, illegal aliens can remain in the country, and aliens warranting relief, have to wait longer for legal status. The delay is not good for them either. Moreover, delay creates an increased incentive for illegal immigration because aliens know that by simply filing an appeal, however meritless, they can often stay in the country for years.

Finally, there is even greater incentive to file frivolous appeals, thereby perpetuating an endless loop of more delay, more illegal immigration, and more litigation. The loop doesn't end, it just gets worse.

But Title VII-A would help break this loop, and stem the flood tide of immigration appeals. Most importantly, Section 707 would require an illegal alien to obtain a certificate of reviewability before he could pursue an appeal. This is precisely the same mechanism that exists in the habeas context as the result of a bill that the Chairman and Senator Hatch wisely introduced 11 years ago. It makes sense in the immigration context too. It would help reduce unnecessary litigation while simultaneously leaving the courthouse doors open to every single alien. No one, absolutely no one, would

be precluded from raising his legal and constitutional claims. We support VII-A.

We cannot, however, support VII-B. First and foremost, the provisions in VII-B largely insulate adjudicators and EOIR from any executive branch oversight or supervision. Immigration judges would be able to decide who stays and who goes without any prospect for review by the Attorney General, the Nation's chief law enforcement officer.

This is a problem because we can all agree that controlling one's borders is a quintessential and critical element of sovereignty. It is inextricably intertwined with foreign policy, the economy and domestic security. Without question, the power to decide immigration cases and develop policy through case-by-case adjudication, should not be transferred to unaccountable agency officials.

Finally, such a transfer is bad timing for two reasons. First, it is premature because it would short circuit the Attorney General's comprehensive review of EOIR, which has been enthusiastically welcomed by the Federal Courts; and second, it would give rise to additional litigation as it would allow, and effectively require, the Secretary of Homeland Security to challenge erroneous agency decision I Federal Court.

Once again, thank you very much for the opportunity to testify. I look forward to any questions that the Committee might have.

[The prepared statement of Mr. Cohn appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Mr. Cohn.

We now turn to Professor David Martin, professor of international law at the University of Virginia Law School; bachelor's degree from DePauw University and a law degree from Yale, where he was editor-in-chief of the Yale Law Journal, quite a distinction.

Thank you for coming in, Professor Martin, and we turn to you now.

STATEMENT OF DAVID A. MARTIN, PROFESSOR OF LAW, UNIVERSITY OF VIRGINIA, CHARLOTTESVILLE, VIRGINIA

Mr. MARTIN. Thank you very much, Mr. Chairman, Senator Sessions. I appreciate the invitation to be here and address these important questions. I have taught and written about immigration law and constitutional law for 25 years, and I have also served as General Counsel at the Immigration and Naturalization Service for two and a half years in the mid 1990's, and that afforded me some close inside acquaintance with how review affects the operations of the agencies.

The Committee is right to be concerned about the current system for administrative and judicial review of immigration decisions. it has been under stress in recent years with some of the difficult consequences that Mr. Cohn, in his testimony, has talked about.

But it would be unwise, in my opinion, to consolidate all judicial appeals in the Federal Circuit. The Nation and the agencies involved actually benefit from the involvement of the general jurisdiction courts and the consideration of immigration issues. They have been finding ways to adapt to the new caseload. Their efforts should be allowed time to mature.

Also, I believe that the single-judge screening mechanism provided by Section 707, would risk denying court consideration in cases where careful review should be provided. It might also prove counterproductive, ultimately creating more work for the court or courts involved, as Judge Michel suggested in the earlier panel.

The remedies should focus instead on restoring sound functioning by the Board of Immigration Appeals and the immigration judges. This requires both additional resources and the return, in essence, to a system of administrative and appellate review that operated before the 2002 streamlining regulations.

Let me turn to the issue of consolidation. Two main arguments are offered in support of consolidation, one having to do with a risk of forum shopping, and the other the important desirability for uniformity and consistency in administration. Forum shopping, I would submit, is not a significant issue after amendments adopted by the Congress in 1996, that require that review be had in the circuit with jurisdiction over the place where the immigration judge issued the initial ruling. That initial venue is largely determined by where the Department of Homeland Security files the case.

As to consistency and uniformity, the focus on a few well-known circuit splits obscures the vast range of complex issues on which there is no real dispute, or where courts have properly deferred to administrative interpretations. I was very much involved in the internal process in implementing the 1996 changes, presenting a lot of complex issues. We worked hard in resolving those questions. I have been pleased to see over the years that most of those resolutions that we achieved have simply been accepted and have not been challenged.

It is only a small number of instances that the circuits have split, but these differences are probably beneficial for the overall health of the system, because circuit splits serve the purpose of helping to signal when there are ambiguities in the law, significant constitutional issues, or difficulties in reconciling the many policy objectives our immigration laws serve.

Ultimate resolution by the Supreme Court benefits from the efforts of seasoned judges from different circuits to analyze the issues afresh. If all appeals went only to the Federal Circuit, a prematurely uniform resolution of truly difficult questions might impede this valuable percolation process. I would add that Congress is also quite capable of resolving circuit splits over statutory interpretation. It did so in the REAL Id Act passed last year. I addressed one of the specific splits in the circuits, that over standards for reviewing credibility determinations that has been invoked in some of the testimony. And Section 705 of the Chairman's mark would resolve another oft-invoked split over reinstatement of removal.

With regard to the certificate of reviewability, like the Judicial Conference and several of the judges here, I urge the Committee not to adopt that procedure. The individuals involved in standard removal cases deserve at least one opportunity for full consideration by Article III judges. We should at least gain more experience with the full impact of the current judicial management measures that the circuits have adopted before undertaking so sharp a departure from our usual approach to court access where individual

stakes may be quite high, and constitutional claims may be implicated.

Furthermore, screening mechanisms of this kind ordinarily presuppose the availability of robust review of the initial decision elsewhere. With the 2002 changes at the BIA, unfortunately, this is not the case in many of the cases in immigration law.

The Department of Justice has analogized this procedure to the certificate of appealability and the habeas framework, but that is provided for a screening of appeals from a full decision by a district court judge and its collateral review after full direct review has been available earlier. At issue here is the only opportunity for direct judicial review of immigration decisions. So I agree with the Judicial Conference's conclusions on that point.

If I might have just 30 seconds to finish up.

Chairman SPECTER. Go ahead, Professor Martin.

Mr. MARTIN. Thank you very much. The Federal Judicial Conference, the U.S. Judicial Conference suggested in its response to Section 707, and I quote, "Streamlining both the administrative and appellate review of immigration cases raises concerns about whether the process would provide a meaningful review."

As that letter indirectly suggests, the current stresses on the system for judicial review could best be addressed by restoring sound functioning of the adjudication and appeals system at the administrative level, and Title VII of the Chairman's mark contains many promising provisions to this end.

The most useful investment that Congress could make in solving the problems would be additional resources for the immigration courts and the Board of Immigration Appeals. Also restoring the Board to the size of 23, or perhaps at some point, to even more members.

Section 712 of the Chairman's mark would also make very important changes in the procedures set up by the 2002 regulations. Particularly, it would greatly limit the occasions in which single-member decisions, affirmances without opinion, or other summary dispositions would be permitted. I think this would reduce litigant frustration that has contributed to the striking increase in appeals, and for those appeals that are still taken, as the judges said, such administrative treatment should foster prompt resolution by the courts and help assure proper deference to administrative decisions.

Thank you.

[The prepared statement of Mr. Martin appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Professor Martin.

Mr. Cohn, in your testimony and in your written statement, you say the provision in Title VII-B would insulate adjudicators in the Executive Office of Immigration Review from executive branch oversight or supervision. Where you have immigration review by the immigration officer or the Board of Immigration Appeals, isn't that essentially a judicial function?

Mr. COHN. Mr. Chairman, it is not essentially a judicial function. As the Supreme Court has recognized, the execution of the immigration laws is the quintessential sovereign function, is, in fact, the quintessential executive branch function.

When you look at the types of cases that come before the IJs and the BIA, it makes sense why the AG should have review of their decisions. We were talking about fundamental decisions that affect foreign policy and national security.

Chairman SPECTER. Well, those decisions, foreign policy and national security, are involved in the decision by the circuit courts when they review what has been done. Obviously, you are not making any claim that the judicial review by the circuit would be subject to executive control under Article II. And when you have judicial review, it is pretty hard, it seems to me, to say it is anything but judicial review where you have an immigration judge—you call him a judge—where you have a Board of Immigration Appeals—you call it an appeal. It seems to me those are essentially judicial functions.

Now, maybe it is working our fine and does not need to be altered. But you have already stated your opinion. I just have a question about—

Mr. COHN. If I may, though, some decisions are not reviewed by the Federal courts. For instance, most forms of relief are discretionary—asylum, adjustment of status, cancellation. And under the INA, the Federal courts do not and cannot review the discretionary determinations. Those are properly left to the executive branch.

Chairman SPECTER. But the circuit courts of appeal review them.

Mr. MARTIN. No, they don't. Under 242(a)(2)(B)(ii), they do not have jurisdiction to review those discretionary determinations.

Chairman SPECTER. Well, if there is an asylum appeal, is that discretionary?

Mr. MARTIN. There are some factual and legal elements in the asylum case which are reviewable, and there is a carve-out for the discretionary—

Chairman SPECTER. Well, wait, wait—

Mr. MARTIN [continuing]. Determination for asylum.

Chairman SPECTER. Asylum cases are discretionary and reviewable.

Mr. MARTIN. There is a carve-out in 242(a)(2)(B)(ii) for asylum, but for instance, adjustment of status for cancellation, those final discretionary determinations are currently unreviewable. And those determinations would be made by the IJs and the Board without any oversight by the Attorney General if Title VII-B were enacted.

And let's look at a couple of examples because this gives life to the point, give some life to the argument. Over the past 5 years, the Attorney General, back when Ashcroft was the Attorney General, he heard a couple cases involving claims for discretionary relief. One involved a terrorist. Another involved a child abuser who killed a baby by shaking it. In those cases, the Board granted discretionary relief, but the Attorney General stepped in and reversed it.

Being opposed to terrorists and child abuse, I think that the Attorney General made a wise decision in stepping in and reversing those discretionary determinations.

Chairman SPECTER. How do you account for the decisions by the Board of Immigration Appeals?

Mr. MARTIN. Even hard-working, committed civil servants sometimes make mistakes, and that is why you want to have—

Chairman SPECTER. How about the Attorney General making mistakes?

Mr. MARTIN. And that is why you want the decision—

Chairman SPECTER. How about the Attorney General making mistakes?

Mr. MARTIN. If the Attorney General makes a mistake, he is directly accountable to the President, who is accountable to the American people, and political action should be taken. And that is precisely why these very sensitive determinations should remain in the hands of accountable executive branch officials and not immigration judges and unaccountable Board members.

Chairman SPECTER. Mr. Cohn, the Department of Justice has no objection to adding more Board of Immigration Appeals personnel and to having three of those in the Board make the decision and writing opinions?

Mr. COHN. Both of those matters are currently being reviewed by the Attorney General as part of his top-to-bottom comprehensive review, which has been warmly welcomed by the Federal judges and the immigration bar as a whole. At this point we think it is premature to preempt that review and take action in that regard. He is considering both the issue of whether to cut back on the use of AWOs, affirmance without opinions, and also considering whether the size of the Board should be changed.

Chairman SPECTER. Well, just one follow-up question. My red light is on. You say it would be premature, but the Congress is considering immigration reform. Are you suggesting that it is beyond our purview to make a judgment on those questions just because the Attorney General has not finished his top-to-bottom review?

Mr. COHN. Oh, absolutely not. Mr. Chairman. It is definitely your prerogative to act now. I was just suggesting that it might make sense to hold back just a little bit. The review is shortly going to be completed, and if the Attorney General does not take reforms that measure up to what this Committee would like to see, then at that point it makes sense, I believe—

Chairman SPECTER. Mr. Cohn, I do not know how to hold back a little. I wanted to hold this bill back a little and was put—not on the fast track, but on the speed track. So if the Attorney General has something to tell us, it would be very useful if he would do so before we make an independent judgment, although we prize our independence, too.

Senator Sessions?

Senator SESSIONS. Well, Mr. Cohn, are you saying that the Department of Justice may request more immigration judges but have not yet done so?

Mr. COHN. Oh, there are two issues. One is the question of resources, and we have requested more immigration judges.

Senator SESSIONS. When did you do that? Is that part of this year's budget request or last year's?

Mr. COHN. Yes, in this year's budget request. We have also requested more attorneys for my office, the Office of Immigration Litigation. We are currently overwhelmed by the flood tide of cases, and the President requested roughly $10 million more to cover 114 new positions, including 86 new attorneys. What I was referring to earlier is the composition of the Board, the number of Board mem-

bers, and for that, the Attorney General is reviewing that issue and has not made a determination on that.

Senator SESSIONS. What Board members are you referring to there?

Mr. COHN. Sure. Within the—

Senator SESSIONS. I mean, what precisely do you mean? What Board are you talking about?

Mr. COHN. The Board of Immigration Appeals. That is the body in the Department of Justice that reviews the decisions of the immigration judges.

Senator SESSIONS. All right. Well, first, I think it has been slow coming to this. Obviously, we have got a problem and sometimes the fact that you have insufficient resources exacerbates the problem in a lot of different ways. For example, is it correct that it is a 600-percent increase in appeals since 2001?

Mr. COHN. Absolutely, Senator.

Senator SESSIONS. I mean, that is an incredible number, 6 times the number of appeals just since 2001. We are not seeing that many more people come into our country. So obviously, there is just more litigation.

Mr. COHN. Much more litigation, and there are two reasons for it. The first is there is increased enforcement, and the second is the appeal rate has risen. The rate at which aliens challenge the decisions of the Board of Immigration Appeals in the Federal courts has increased dramatically since 2002. In 2002, the rate of appeal was only 10 percent nationwide, and this past year, it reached 30 percent. That is a tremendous increase in the rate of appeal.

What is interesting is the conventional wisdom, as Professor Martin noted, is that the reason for the increase in appeals is the increase in the affirmances without opinions, the AWOs. But that conventional wisdom is actually erroneous. The rate of appeal, again, in 2002 was 10 percent, but back then 31 percent of all Board decisions were AWOs. Now, only 20 percent of Board decisions are AWOs, yet the appeal rate has risen to 30 percent. That is directly contrary to the conventional wisdom that Professor Martin—

Senator SESSIONS. Well, are they winning more on appeal? Does that indicate that there are more errors made? What is the reversal rate?

Mr. COHN. The reversal rate is extremely low, Senator. If you look at cases that are terminated on the merits, the Department of Justice prevails in 86 percent of those cases nationwide. Oftentimes, people point to the Seventh Circuit, which reversed us last year 39 percent, but the Seventh Circuit is an outlier in that regard, and they have only 2 percent of the total number of appeals. Eighty-six percent is the nationwide number, and that understates the rate of success of the Board for a couple reasons. First of all, it does not take into account the procedural victories. If you take those into account, the rate of success is over 90 percent. Also, it does not take into account the very large number of cases that never make it to Federal court. In 2005, there were 265,000 decisions by immigration judges in removal cases, and there were only 560 or so reversals by the Federal courts.

So if you look at those numbers, it is unfair to suggest that the Board is making erroneous decisions systematically. In fact, I think those numbers show the Board, despite the large volume, is doing a very fine job.

Senator SESSIONS. Tell me about this, though. It takes 27 months—I saw on page 3 of your testimony—to process a BIA appeal. What does that mean? Does that mean from the time that the Board of Immigration Appeals rules or the time the appeal is filed is 27 months?

Mr. COHN. It is from the time the appeal is filed. An alien has 30 days to file the appeal, and then once he files it, it took on average 27 months for the Second Circuit to decide the case. And that is a problem, as you know, because that delay—

Senator SESSIONS. Now, wait a minute, 27 months from the time he appealed from the BIA, the immigration judge's ruling, or from the time the appeal from the initial determination?

Mr. COHN. It is calculated from the time the alien appeals the BIA's decision to Federal court.

Senator SESSIONS. Well, that is an extraordinary number there. I mean, during this time what if this person was not supposed to be here, clearly, and they have just filed an appeal because they know it is going to take on average 27 months, and they get to stay here 2 more years. Is that what is happening out there? Is that driving some of the increase in appeals?

Mr. COHN. In our view, that is absolutely what is happening. If I were an attorney—

Senator SESSIONS. Now, let me ask you this: To the extent to which this is in your responsibility, the Department of Justice, I can blame the President. But I cannot blame the President about this, can I? I mean, this is the time it leaves the executive branch for 27 months to the judicial branch. They have lifetime appointments.

Mr. COHN. Yes, Senator. This is not the President's fault at all.

Senator SESSIONS. I can't even cut their pay.

Mr. COHN. That is exactly right, Senator.

Senator SESSIONS. So we need—I believe this system is broken. It is not working effectively, and these delays indicate part of it, and the longer the delays occur, would you not agree, the more likely people will appeal for frivolous, unsound reasons, but simply to get the delay.

Mr. COHN. Absolutely.

Mr. MARTIN. Senator?

Senator SESSIONS. Should we have—did you want to—

Mr. MARTIN. If I could just comment on part of that, if that would be all right, the delay factor, clearly it has been a situation in immigration appeals that the chance for delay can bring about some additional appeals. But that factor operates no differently after 2002 than it did before 2002. I don't think that can really account for the change in the appeal rate from 10 percent to 25 or 30 percent of BIA decisions being appealed to the courts in that period of time.

Mr. Cohn suggested I was somewhat saddled with the conventional wisdom as to why that change had taken place. Actually, in my testimony, I offer a more complete explanation or analysis of

why that change has occurred. But it is really worth reflecting that the change—there is a marked change around the time of the regulatory changes in 2002 in the way that the BIA, the Board of Immigration Appeals, deals with their appeals.

I think, as I suggested in my testimony, we should look very closely at undoing some of those procedures and augmenting the resources of the Board, and I think that would over time have an impact on reducing the appeal rate and allowing the courts also to get much more on top of their overall caseload. They have been making headway along those lines.

Mr. COHN. If I may, if it is possible, I would like to respond to a point the professor made about delay. He says delay cannot account for the increase in appeals, there was delay before, but a few points.

First of all, the delay in the courts has increased. In 9 of the 11 circuit courts, there has been a significant increase in the delay in the past few years.

In the Second Circuit, as I noted, there is an increase of roughly 170 percent. There has been a tremendous increase in delay, and that gives rise to the incentive for aliens to file these frivolous appeals just to get delay.

The second point, before 2002, the Board provided a lot of delay because of their backlog. But the backlog is gone. There isn't so much delay. It takes months instead of years for the Board to decide cases. So aliens who want delay can't rely on the Board anymore. They have to file their appeal, however meritless, in the courts of appeals, and that is why delay matters.

Finally, it is interesting to note that the appeal rate did not rise precipitously after streamlining the AWOs. It rose recently perhaps as a result of the conventional wisdom catching on. The more that advocates and judges and Members of Congress speak of the problems with the Board, which really don't exist, there is more reason for aliens and their attorneys to think that there is relief in the circuit courts. They are not winning in the circuit courts, but they hear the conventional wisdom, and they think that is a reason to appeal.

Chairman SPECTER. Thank you, Senator Sessions.

Senator SESSIONS. Sorry to go over, Mr. Chairman.

Chairman SPECTER. Professor Martin, what is your view of the Chairman's mark to increase the number of Board of Immigration Appeals to 23 and have the requirement that they sit in panels of three and write opinions?

Mr. MARTIN. I would favor that change. I think that that is necessary, given the volume of immigration appellate business. And I think there may be some instances in which a single-member disposition may be appropriate, but it would be a very short list of very discretely identified circumstances, such as was the case under the 1999 regulations, much more carefully designed, had a much more limited use of summary dispositions. So I would favor that.

If I might also address the independence question that you raised earlier with Mr. Cohn, if that would be OK?

Chairman SPECTER. Go ahead.

Mr. MARTIN. It is clearly important to have immigration judges and Board members act independently in the individual decisions that they make. Nobody disputes it would be improper for someone from the Justice Department or the private bar to call up the decisionmaker and influence the way in which it should come out.

There are parts of the Chairman's mark that I think would help to make sure that there is adequate insulation along those lines. For example, a stated term of reasonable length for—

Chairman SPECTER. Do you think there is adequate insulation, as you put it, available now?

Mr. MARTIN. Well, I do. In general, I think that is the case, and I think the reaction from the judges, when you posed a similar question to them, reflects that there is not a major problem with undue influence or a skewing of results under the current structure of the Board.

Chairman SPECTER. Professor Martin, if the Attorney General does not like the result reached by the immigration judge and affirmed by the Board of Immigration Appeals, why wouldn't it be a better process to have him take the appeal to the circuit court rather than simply disagreeing with those two judicial decisions?

Mr. MARTIN. Well, I think that is the second part of overall independence. The decisional independence by the judges when they make their decision, or the Board, there is a very limited procedure now, as the Chairman knows, for the Attorney General in a formal procedure to take referral or certification of the case and issue the final decision, essentially become the highest level of administrative appellate review. That is a formalized—

Chairman SPECTER. The Attorney General personally.

Mr. MARTIN. The Attorney General personally, that is right. And I think—

Chairman SPECTER. Well, is that—

Mr. MARTIN. —that is appropriate—

Chairman SPECTER. Is that more desirable than having the circuit court, if the Government wins, the individual goes to the circuit court. If the Government loses, why shouldn't the Government go to the circuit court?

Mr. MARTIN. Well, I do think there is a limited range of issues. This certification process has been sparingly used. There is a limited range of issues where there are difficult questions of both policy and law that are involved in a decision by the BIA or ultimately by the Attorney General. To have the possibility on a limited range of occasions for the Attorney General to take certification, to decide that matter, to draw upon his own perspective on foreign policy implications, national security implications, I think that is appropriate. But the Attorney General has to write an opinion, has to give formal reasons, and the Attorney General's decision in that way is subject, as it should be, to court of appeals review.

Chairman SPECTER. Well, if the matter involves foreign policy and national security, those issues are decided by the circuit courts if the appellate process goes in favor of the Government.

Mr. MARTIN. That is true, and I think it is a close question as to whether that structure for more independence from the Attorney General would be superior to what we have now.

I just want to point out that the current system does not involve, in my mind, undue influence by the enforcement branch in this field, and the way in which the Attorney General can issue a precedent decision on a very limited range of occasions structures and confines any role that the Attorney General has.

Chairman SPECTER. What would you think of having the immigration judges ranked by the Merit Systems Protection Board and dischargeable only for cause and reviewed by the Merit Systems Protection Board?

Mr. MARTIN. Well, I think I am not deeply familiar with the ranking system by the Merit Systems Protection Board. There certainly have been issues of—occasional issues of quality of performance by certain individual judges, so that might be appropriate.

I do think it is a good system to have a stated term of years with removability only for cause. I would want to think more carefully about whether that should ultimately be reviewable in the Merit Systems Protection Board rather than leaving a bit more discretion to the Attorney General to decide whether or not good cause has been shown for removal. But it is very rare to remove an immigration judge.

Chairman SPECTER. Thank you, Professor Martin.

Senator Sessions, you have the last word.

Senator SESSIONS. Thank you. Well, that question of the executive branch taking itself—it really would be taking itself to court because the bureau of appeals is an executive branch/Department of Justice entity and so is the Attorney General, so they are suing one another in court. In our scheme of Government, often misunderstood, they are heads that make final decisions, so this simply says that the Attorney General, Mr. Cohn—I want to get this straight. You talked about Attorney General Ashcroft had overruled the BIA's final decision, right? But you indicated that was the final decision, but his decision then is subject to appeal to the courts to make sure he conducted his process in a fair and objective way, followed the law, and acted within his discretion. Is that not right?

Mr. COHN. That is right, Senator.

Senator SESSIONS. So what you are talking about is you always need to look for a final decision of the executive branch, and it simply allows the Attorney General to make that branch as an accountable officer who has a name, who has a responsibility to the public, who can be held account and the person who appoints him can be held accountable. But these judges have got terms and outside of the Department of Justice and the whole political process, they are not answerable to anybody if we go with the suggestion we have heard here. Would you agree that that would be a problem, Mr. Cohn?

Mr. COHN. I could not agree more with you. That is absolutely correct. That would be a problem if you had unaccountable immigration judges and Board members deciding these matters, which involve quintessential sovereign functions. The keys to our borders should not be handed over to unaccountable officials.

Senator SESSIONS. And just for the record, I don't know if you mentioned this, but the streamlining procedures that allow one

judge to make the decision and can affirm without opinion, those were—that procedure was established in 1999. Is that right?

Mr. COHN. That is right, Senator.

Senator SESSIONS. That was when Attorney General Janet Reno was the Attorney General of the United States.

Mr. COHN. Yes, that is right, Senator. They were revised in 2002, but the original streamlining was in 1999, and it is important to note, again, that the year before Attorney General Ashcroft changed the procedures, 31 percent of all Board decisions were AWOs, which is higher, about 50 percent higher, than what it is today.

Mr. MARTIN. Could I address that?

Senator SESSIONS. Go ahead.

Mr. MARTIN. Because the 1999 regulations did provide for AWOs, affirmances without opinion. But it allowed them in a much more limited range of circumstances. It was much more carefully crafted to focus only on truly frivolous substanceless appeals. The rate was high because the Board was trying initially to clear out a lot of the old weak appeals, and they were able to do that at a high level at that time.

It is very different under the current situation where a much wider range of cases can be resolved, to the frustration of many judges, as we saw in the earlier panel.

Senator SESSIONS. With regard to this asylum question, my time is about out, and I do not want you to go over, if you can avoid it. But you have worked on that a lot, I think, Mr. Martin and Mr. Cohn. Is there any way we can draft the statute so asylum is clearer and have clearer standards so that it is easier to review on appeal and can result in less appeals and less decisions being made based on the length of the chancellor's foot or how he may feel that day? Do you think we could do better with that?

Mr. COHN. You definitely could, Senator, and one way to reduce the rate of appeal, of course, is this Certificate of Reviewability I have because that would allow the courts to eliminate the frivolous appeals expeditiously, thereby reducing the incentive that aliens have to file the frivolous appeals. And some judges have suggested that particular cases are difficult to decide, and they have to look at the entire record. And some might be, and in those cases they can grant the Certificate of Reviewability. But many cases are not very difficult to decide. In some cases, the alien makes no argument at all in his brief and just files a brief to get delay. Sometimes he files the brief out of time. It is untimely, there is no jurisdiction, but there is still a delay. It does not require three judges to see that a brief has no argument or is filed out of time.

And in some cases, even when there is a timely brief with an argument, it is clear the argument is meritless. For instance, in one recent case, an alien claimed he was going to face persecution back in Mexico because he hurt his elbow and could not work a manual labor job. Well, of course, he admitted that he is currently in the United States working a manual labor job as a fence builder, so that claim is facially frivolous. Nonetheless, it does take time. It delays his proceedings. He can remain in the country longer.

Senator SESSIONS. Mr. Martin, any final comments? My time is about up.

Mr. MARTIN. Thank you. I will be brief.

I take it that at least a part of your question was about whether the asylum provisions themselves could be rewritten to make the standards crisper and cleaner. I think that is unlikely to work. Many countries around the world, democratic countries, are struggling with this. A lot of them face difficulty asylum caseloads. The best I think we have been able to do is develop a body of case law that has provided much—some clearer guidelines along the way, and those issues have gradually been settling in over time. I think we have made a lot of progress in improving the efficiency of the asylum system.

So I think that is the way to do it, and I think we can continue. It is an important commitment to this country from our earliest days to provide asylum. And as frustrating and difficult as that can be, I believe we can structure a system that adequately protects individuals and still allows for efficient resolution of the claims.

Chairman SPECTER. Thank you, Senator Sessions. Thank you, Mr. Cohn. Thank you, Professor Martin.

Without objection, we will introduce the written statement of Senator Leahy, who could not be here because of a prior commitment. This hearing was scheduled just a week ago today. And also the statements of Chief Judge Schroeder of the Ninth Circuit, Judge Kozinski of the Ninth Circuit, Judge Posner of the Seventh Circuit, and the Judicial Conference of the United States.

Thank you all.

[Whereupon, at 12:18 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

[Additional material is being retained in the Committee files.]

QUESTIONS AND ANSWERS

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 6, 2006

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please find enclosed the Department of Justice's responses to questions directed to Jonathan Cohn, Deputy Assistant Attorney General for the Civil Division, following Mr. Cohn's testimony at the April 3, 2006 hearing entitled "Immigration Litigation Reduction."

The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to the submission of this proposal. Please do not hesitate to call upon us if we may be of additional assistance.

Sincerely,

William E. Moschella
Assistant Attorney General

Enclosure

cc: The Honorable Patrick J. Leahy
Ranking Minority Member

Questions of Senator Patrick Leahy
Ranking Member, Judiciary Committee
Hearing on Immigration Reform
April 3, 2006

Questions for Mr. Jonathan Cohn

1. **Statistics on the BIA's rejections of appeals from Immigration Judge decisions are conspicuously absent in the EOIR's recent annual report. Media accounts and preliminary studies indicate that since the 2002 BIA streamlining measures took effect, the Board has ruled against non-citizens significantly more often than the years before 2002. Please provide a breakdown of the disposition of IJ appeals to the BIA for the past five years, year by year, including a breakdown by the grounds for rejections and by the party appealing the decision.**

   Answer: Attached is a chart showing the results of appeals filed by the parties in immigration proceedings and the decision by the BIA. The BIA does not track the reasons for upholding or dismissing appeals.

2. **In your testimony, you contend that the rapid rise in immigration appeals to the circuit courts is due only to increased enforcement efforts and increased appeals to the BIA. Have you considered the effects of the broad expansion of summary affirmances and one-judge review following the BIA streamlining in 2002? If the BIA were to reinstate full written opinions for more categories of cases, would that likely result in a lower rate of appeals to the federal circuits?**

   Answer: The Department has considered the effects of "streamlining," a process that began under Attorney General Reno in 1999 and was expanded under Attorney General Ashcroft in 2002. It is difficult to conclude that streamlining is to blame for the increase in the number of immigration appeals in the federal courts. First, streamlining applies to the entire country, but the floodtide of appeals is primarily concentrated in two circuits, the Second and the Ninth. In those courts, the appeal rate from the Board to the federal court is roughly 38 percent. By contrast, in the Eleventh Circuit, the appeal rate is only 8 percent. This suggests that a number of other factors are also at work, including the fact that the Second and Ninth Circuits are the most generous in terms of stays of removal.

   Second, the BIA has actually reduced the number of affirmances without opinion (AWOs) since fiscal year 2002, but the rate of appeal to the federal courts has increased over the same time period. In fiscal year 2002 (which pre-dates Attorney General Ashcroft's streamlining regulation), 31% of all Board decisions were AWOs; now, only 20 percent of board decisions are AWOs. Over the same time period, the rate of appeal nationwide has increased from 10% to 29%

(largely because of the increases in the Second and Ninth Circuits, which account for roughly 75% of the caseload).

Third, one cannot reasonably conclude that streamlining has caused the increase in appeals (or that longer Board opinions would reduce the rate of appeal). Opponents of streamlining have claimed that aliens appeal to the federal courts because they are dissatisfied with the AWO or the short single-judge opinion and they are seeking a better explanation from the federal courts. Under this logic, however, an alien would not appeal – but would instead accept the Board's judgment and return home – if he simply got a longer opinion from the Board. In light of the economic incentive that many aliens have to stay in the United States, this seems implausible.

Instead, much of the increase in the rate of appeals is likely due to the interest tha illegal aliens have in delaying their removal. Before streamlining, aliens did not have to appeal to the federal courts to obtain years of delay, because it often took the Board several years to decide a case. Now, however, the Board takes only months to decide the average case, so the aliens have to turn to the federal courts for delay. It is thus unsurprising that the federal courts with the most generous stay policies have also suffered from the largest appeal rates.

3. **The committee was presented with contradictory testimony regarding the extent of forum shopping in immigration cases. The INA provides that judicial review of removal orders is available only in "the court of appeals for the judicial circuit in which the immigration judge completed the proceedings." 8 U.S.C. 1252(b)(2). Is venue in immigration court not determined in the first instance by ICE, depending where it chooses to file the Notice to Appear and detain the respondent? And is it not also correct that respondents have no right to transfer venue in removal proceedings, after ICE's initial choice of venue, but may only request transfer in the discretion of the Immigration Judge?**

Answer: The Department did not present testimony regarding forum shopping. In any event, there is a potential for forum shopping even though judicial review of removal orders is available only in "the court of appeals for the judicial circuit in which the immigration judge completed the proceedings," 8 U.S.C. § 1252(b)(2), venue in immigration court is determined in the first instance by ICE, and aliens have no right to transfer venue. Under the regulations, immigration judges have the discretion to transfer venue for good cause, 8 C.F.R. § 1003.20(b), and thus they can accommodate aliens for whom it would be a hardship to travel to the initial venue for removal proceedings. Aliens can take advantage of EOIR's accommodation and move to the most advantageous forum. A rule or practice limiting changes of venue might make forum shopping more difficult, but it could also impose a burden on aliens.

Board of Immigration Appeals Outcomes of Case Appeals by Appealing Parties FY 2001 – FY 2005

Appealing Party	Year Appeal Decided	BIA Decision				
	Decided	Sustain	Dismiss	Remand	Other	Total
Alien	FY 2001	1,110	10,484	3,293	3,598	18,485
	FY 2002	890	26,193	3,648	1,297	32,028
	FY 2003	1,194	25,010	3,055	489	29,748
	FY 2004	1,035	25,684	2,433	299	29,451
	FY 2005	676	21,944	2,452	146	25,218
Government	FY 2001	113	1,413	165	153	1,844
	FY 2002	262	1,096	424	72	1,854
	FY 2003	409	1,183	514	46	2,152
	FY 2004	345	776	545	14	1,680
	FY 2005	224	874	531	14	1,643
Both	FY 2001	12	37	30	22	101
	FY 2002	15	61	28	18	122
	FY 2003	24	105	38	25	192
	FY 2004	22	74	30	16	142
	FY 2005	15	54	71	12	152
Other	FY 2001	10	62	42	17	131
	FY 2002	17	144	53	34	248
	FY 2003	5	139	57	17	218
	FY 2004	11	192	70	33	306
	FY 2005	11	204	106	29	350
	TOTAL	6,400	115,729	17,585	6,351	146,065

Note: The above table shows decisions on case appeals decided at the Board of Immigration Appeals. While we can discern which party appealed an immigration judge decision, we are unable to track the precise reasons for each appeal or the outcome of each issue that was on appeal. Please note that appeals are often sustained in part and dismissed in part and that cases may have had one or more appeals filed during this time frame. An "Other" BIA decision usually refers to administrative closure of a case, the granting of Temporary Protected Status, or the continuation of a case. Where the appealing party is "Other," this refers to cases where an immigration judge certifies a case to the BIA.

SUBMISSIONS FOR THE RECORD

March 30, 2006

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Member, Committee on the Judiciary
United States Senate
433 Russell Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman and Senator Leahy:

On behalf of the American Bar Association Section of Intellectual Property Law ("the Section"), I write to express the opposition of the Section to provisions in immigration reform legislation under consideration in the Senate that would transfer jurisdiction over immigration appeals to the U.S. Court of Appeals for the Federal Circuit. These provisions are found in Subtitle A of Section VII of your bill, S. _____, the "Comprehensive Immigration Control Act of 2006," and in Title V of the bill introduced by Majority Leader Frist, S. 2454, the "Securing America's Borders Act."

The views expressed in this letter are those of the Section of Intellectual Property Law. They have not been submitted to nor approved by the ABA House of Delegates or Board of Governors and should not, therefore, be construed as representing policy of the American Bar Association.

The two bills would transfer exclusive jurisdiction to the United States Court of Appeals for the Federal Circuit of appeals from final administrative orders or district court decisions arising from any action taken, or proceeding brought, to remove or exclude an alien from the United States. This would include appeals from decisions of the Board of Immigration Appeals (BIA) and from district court decisions in habeas corpus proceedings challenging the detention of an alien. The bills would increase the number of authorized judgeships in the Federal Circuit from 12 to 15 and would also authorize unspecified additional appropriations for fiscal years 2007-2011 to meet the expanded responsibilities of the Federal Circuit, including the hiring of additional attorneys.

The Court of Appeals for the Federal Circuit is a court of special jurisdiction, including appeals in patent case. The Court was established in 1982, after a decade of public commission study and congressional consideration. A primary consideration in the creation of the Federal Circuit was a finding that the regional circuits were producing an unacceptable lack of uniformity in interpreting patent laws, and that there was a need to consolidate these appeals in a single national court of appeals. The record of the Court in the 24 years since its creation demonstrates that great progress has been made in providing the needed nationwide stability and consistency in patent law jurisprudence.

No such study, consideration, or record has been made for consolidating all immigration appeals in the Federal Circuit or in other single appellate court. Whether such a case could be made is a matter beyond our expertise and one on which we do and would not express views. We do, however, believe that we are competent to express views on the impact on patent laws and innovation of such a radical change in the jurisdiction and responsibilities of the Federal Circuit. Our view is that the impact would be extremely negative and damaging.

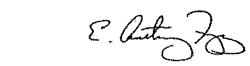
The numbers alone suggest that this is likely to be the case. Statistics for the fiscal year ending September 30, 2005 show that more than 12,000 appeals from the Board of Immigration Appeals were filed in all the regional circuit courts of appeals. In that same year, the Federal Circuit received 1,555 appeals within all of its existing areas of jurisdiction. The bills would authorize three additional judges for the Federal Circuit, for a total of 15. An increase in judgeships of 25% in the face of an 800% increase in caseload is obviously inadequate. Perhaps equally important, the bills do not provide adequately for the necessary increase in the staffing and other resources for the Court, even for the three additional judges. The bills attempt to address these needs by authorizing the appropriation of "such sums as may be necessary to carry out this subsection, including the hiring of additional attorneys for the Court." By way of contrast, we note that Chairman Specter's bill authorizes, for each of fiscal years 2007 through 2011, specific annual increases of 100 attorneys for the Department of Justice, 100 attorneys for the Department of Homeland Security, and 50 immigration judges for the Department of Justice.

It can be expected that the delays that are currently being experienced in the filling of judicial vacancies will continue, and that any new additional judges will not be available to hear cases for quite some time beyond the arrival of the flood of immigration appeals in the Court. Existing judges of the Court will initially be unfamiliar with immigration cases, and may require additional time to dispose of cases. Provisions in the bills restricting initial review to a single judge and making non-reviewable that judge's denial of a petition for review may reduce the burden on the Court, but it seems unlikely to provide adequate relief.

While it is not possible to predict the exact impact of the proposed legislation on patent cases and the patent system, it seems inevitable that it will be negative and will be substantial. Even with the addition of three additional judges, the average caseload of the Court's judges would increase from about 125 per year to over 900. Apart from the sheer magnitude of such an increase in caseload, the fact that almost 90% of that caseload will be new subject matter is certain to have a detrimental effect on the Court's attention to cases within its current subject matter jurisdiction. It can be expected that delays and uncertainty in the disposition of patent and other appeals will result. The requirement in the legislation that petitions for judicial review be acted on by the Federal Circuit within 60 days adds to this likelihood. Attention will likely be paid to the distribution of the subject matter of the Court's cases in making appointments to the Court. It therefore seems plausible to expect that priority may be given to nominees with background in expertise in immigration law, not only for the proposed three new judgeships, but for other future vacancies. The expertise and efficiency that the Federal Circuit has developed in the adjudication of complex patent cases will necessarily be diluted, to the detriment of the U.S. patent system and to American innovation and economic development.

For these reasons, we strongly urge you to remove from the immigration reform legislation the provisions that would transfer jurisdiction over immigration appeals to the U.S. Court of Appeals for the Federal Circuit.

Sincerely,



E. Anthony Figg
Chair

AIPLA
AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION
2001 JEFFERSON DAVIS HIGHWAY • SUITE 203 • ARLINGTON, Virginia 22202

March 24, 2006

The Honorable Arlen Specter
Chairman, Senate Judiciary Committee
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510-6275

Dear Chairman Specter:

I am writing to you on behalf of the American Intellectual Property Law Association (AIPLA) regarding the pending immigration reform legislation that would transfer jurisdiction over immigration appeals to the U.S. Court of Appeals for the Federal Circuit. We believe that such broadening of the Federal Circuit's jurisdiction would seriously hinder the court's ability to render high quality, timely decisions on patent appeals from district courts, and patent and trademark appeals from the U.S. Patent and Trademark Office. This runs directly counter to the present efforts of Congress to otherwise reform and improve this nation's patent system.

We take no position on other specific elements of the legislation or on the underlying need for immigration reform. Our concern focuses solely on the proposed shift in appellate jurisdiction, which we believe will do more harm than good.

AIPLA is a national bar association whose approximately 16,000 members are primarily lawyers in private and corporate practice, in government service, and in the academic community. AIPLA represents a wide and diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of patent, trademark, copyright, and unfair competition law, as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property, and have a keen interest in an efficient federal judicial system.

The Court of Appeals for the Federal Circuit was established in 1982 after more than a decade of deliberate study and Congressional consideration. The Hruska Commission (chaired by Senator Roman Hruska) conducted a study lasting nearly three years before recommending to Congress the establishment of a national appeals court to consider patent cases. It took two Administrations, several Congresses, and a number of hearings in both the House and Senate before legislation establishing the Federal Circuit was finally enacted. Over the past 26 years the Court, through its thoughtful and deliberate opinions, has made great progress in providing stability and consistency in the patent law.

Removing immigration appeals from the general jurisdiction of the twelve regional Courts of Appeals and centralizing it in the Federal Circuit is an enormous change. Leaving aside the impact, both pro and con, on the affected litigants, the Federal Circuit is simply not equipped to undertake the more than 12,000 requests for review of deportation orders that twelve courts now share each year. The Federal Circuit currently has no expertise or experience in the field of immigration law. While the legislation envisions adding three judges to the twelve currently on

the Court, we have serious concerns whether this increase will be adequate. Judge Posner has calculated that, even with the three additional judges proposed in the legislation, each of the fifteen Federal Circuit judges would be responsible for about 820 immigration cases per year, on the average—an incredibly large number that we believe will have a significant adverse impact on the remainder of the court's docket.

It seems inevitable that the proposed legislation will have a dramatic, negative impact on Federal Circuit decisions in patent cases and appeals from the USPTO. Such an increased caseload will necessarily delay decisions in these appeals, which in turn will cause uncertainty over patent and trademark rights and interfere with business investments in technological innovation. Beyond mere delay, the Federal Circuit's ability to issue consistent, predictable opinions in patent cases will be complicated by an increase in the number of judges. If conflicts in panel opinions increase, the inefficient and often contentious *en banc* process will have to be used more often, further adding to the overall burden on the court. Business can effectively deal with decisions, positive or negative, but it cannot deal with protracted uncertainty caused by inconsistent opinions or long delays in judicial review.

Demand for reform of the patent system has been the topic of considerable public debate of late. Congress held extensive hearings on this subject last year, and more are scheduled in coming weeks. The House is currently considering legislation that would dramatically change the patent statute, and we understand that patent reform legislation may soon be introduced in the Senate as well. It would be unfortunate for Congress to inadvertently compound the challenges facing the patent system by weakening the ability of the Federal Circuit to give timely and consistent consideration to patent cases.

We appreciate your attention to this matter and urge you to reconsider this proposed expansion of Federal Circuit Court jurisdiction.

Sincerely,

Michael K. Kirk
Executive Director

cc: Members of the Senate Judiciary Committee

Statement of Judge Carlos T. Bea, Circuit Judge, Ninth Circuit Court of Appeals.

Thank you for the opportunity to appear before you today. My name is Carlos Bea. I was appointed to the Ninth Circuit Court of Appeals by President George W. Bush in 2003. My chambers are in San Francisco, California. In addition, to my knowledge, I am the only circuit judge to have been ordered deported by the Immigration and Naturalization Service, appealed that order to the Board of Immigration Appeals, and prevailed on appeal. Also, before becoming a judge I occasionally represented alien clients before Immigration Judges and the Ninth Circuit.

I am here today to offer a few comments on the immigration reforms included in Title VII of the proposed "Comprehensive Immigration Reform Act of 2006."

First, Section 701 provides for the consolidation of appeals of immigration orders in the Federal Circuit.

Immigration law has developed somewhat like our federal tax laws: new legislation has been adopted many times over the years and added to the previous law. As in the tax code, this layering of rules, exceptions and remedies has complicated the law, requiring aliens, executive personnel and judges alike to determine which set of rules applies based on the facts of each case. To this one should add administrative rules and regulations, and even transitional provisions which apply to cases arising during some time periods but not others.

As if not sufficiently daunting, the distribution of appeals from lower court and agency actions throughout the 12 federal circuit courts has increased the complexity of our immigration laws. As is to be expected, there is variation among the regional circuit courts on how to view the facts and apply the law in similar cases. These variations are especially significant in the immigration field because relatively few immigration cases are taken up by the Supreme Court.

This diversity of views crops up in several fields. What is sufficient evidence upon which to credit an Immigration Judge's adverse finding of credibility can vary from circuit to circuit. What constitutes "persecution" for purposes of Asylum can require more stringent actions in one circuit than in another. Whether a prior state conviction qualifies as an "aggravated felony" rendering the alien ineligible for

discretionary relief such as asylum and withholding of removal varies amongst the circuits.[1]

One current issue, which is specifically dealt with in Section 705 of the proposed bill, is whether a Department agency may reinstate a previous order of removal when a previously removed alien reenters the country illegally, or whether that alien must be accorded a full hearing before an Immigration Judge. Recently, a panel of our circuit held a hearing was required;[2] another circuit has held a Department agency can act without a hearing.[3] A circuit split on this issue results in the imposition of different administrative requirements on the government, and the provision of different procedural rights to aliens, in different sections of the country. This is unfair to both the government and the aliens.

Our Immigration law is, and should be, a national pronouncement of policy. Efforts to make that policy uniform throughout the country should be encouraged. The provisions of Title VII constitute an important step in that direction.

Another reason for unification of the appeals process in the Federal Circuit is to reduce forum-shopping among the circuits, as aliens' counsel quite understandably seek those circuit courts which they perceive most friendly to their clients. Venue for appeal can be established by the location at which the alien applies for relief. A glance at the statistics is illuminating. Since 2000, the number

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[1] *Compare Gonzales-Gomez v. Achim*, No.05-2728, 2006 WL 708678 (7th Cir. March 22, 2006) (holding a felony offense under state law does not constitute an "aggravated felony"under 8 U.S.C. § 1101(a)(43) rendering the alien ineligible for cancellation of removal and asylum if the same conduct constitutes only a misdemeanor offense under federal law), *and Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905 (9th Cir. 2004) (same), *and Gerbier v. Holmes*, 280 F.3d 297 (3rd Cir. 2002) (same), *and Aguirre v. INS*, 79 F.3d 315 (2nd Cir. 1996) (same), *with United States v. Hernandez-Avalos*, 251 F.3d 505 (5th Cir. 2001) (holding a state felony conviction for conduct punishable only as a misdemeanor under federal law constitutes an "aggravated felony" under § 1101(a)(43) rendering the alien ineligible for discretionary relief from removal).

[2] *Morales-Izquierdo v. Ashcroft*, 388 F.3d 1299 (9th Cir. 2004) *rehearing en banc granted by* 423 F.3d 1112 (9th Cir. Jan. 5, 2005).

[3] *Lattab v. Ashcroft*, 384 F.3d 8 (1st Cir. 2004).

of appeals from the BIA to the Fifth Circuit which, like the Ninth Circuit, shares a border with Mexico, has increased from 225 to 593, 125%. The number of similar appeals in the Ninth Circuit, however, has risen from 910 to 6,583, or 590%. Interestingly, in 2005 the Fifth Circuit reversed the denial of asylum in only 9% of the cases presenting the issue (4 of 46), while the Ninth Circuit did so in 33% of the cases (193 of 591).

Another feature of Title VII worthy of comment is the increased attention given to improving and increasing the administrative process, with an eye to reducing the number of appeals to the circuit courts.

It is undeniable that since the Board of Immigration Appeals (BIA) instituted its one-judge review and adoption of Immigration Judge rulings, without the former more detailed review, the number of appeals from BIA rulings has dramatically increased. In 2000, prior to the changes in the BIA, there were 1,723 appeals of BIA rulings in all the circuits. In 2005, there were 12,349, a rise of 602%.

There are two clear reasons for this increase in appeals. First, petitioners and their attorneys do not think the one-judge BIA review and adoption procedure has adequately dealt with the claimed errors on appeal. They think they have received "rubber-stamp" treatment. Second, as petitioners and attorney see appeals piling up in the circuit courts, they realize that their appeals will be delayed. During that period of delay, events may change the alien's chances of staying in the country. Those changes may be personal, such as a marriage to a United States citizen or the birth of children or any number of other conditions affecting removability. Or those changes may be political, such as changed country conditions in the alien's home country, or legislative and administrative, such as immigration reform in this country, giving the alien new hopes to remain here. Even if the appeal lacks all merit, the backlog of cases in the circuit courts provides an incentive to appeal by almost guaranteeing a significant delay in deportation.

The provisions of Sections 711 et seq. which enlarge the number of BIA judges, their staff and make three-judge hearings a matter of course are welcome additions. The recognition of the importance of BIA decisions in forming Immigration jurisprudence by providing for en banc hearings by the BIA is also a step forward for uniformity of immigration law.

There are many other provisions of Title VII which are needed improvements, not the least of which is the provision for more Immigration judges, trial attorneys and Federal public defenders in Section 702.

Now a word about some of the objections that have been raised by conscientious voices. The most often heard is that judges should be generalists because they bring greater experience into judging and are not likely to become captives of the interests who frequently appear in specialized courts. This is not a new complaint and it is something to be kept in mind in making judicial appointments.

But I am not aware that the Federal Circuit has fallen into the hands of either applicants for patents or their opponents who seek to avoid the application of the claimed patent. Neither has the National Relations Labor Board become captive to special interests, nor has the Court of Veteran Appeals.

Fears have been voiced that petitioners will not likely receive representation if they have to lodge and argue appeals in far-away Washington, D.C. Two things should be kept in mind: (1) the Federal Circuit has explicit authority to hold hearings in any circuit,[4] in the very same cities where the circuit courts sit today; (2) the overwhelming number of appeals from BIA rulings are determined without hearing by the courts of appeal. For example, in 2005, the Ninth Circuit decided a total of 4,777 cases. Of those, only 472 (9.9%) proceeded to merits panels of three judges, and many of those were submitted on the briefs. The remaining cases were decided by motions panels or by screening panels of three judges which the issues raised were appropriate for summary adjudication.

Last, there is the expressed fear that only circuit court judges from around the country can give the detailed and meaningful consideration necessary to the important, often life-determining, issues involved in Immigration matters. This ignores the care with which national courts such as those mentioned routinely act. The systems for selection of judges to specialized courts and the regional circuit courts is similar. There is no reason to think only regional circuit court judges are sufficiently sensitive to administer justice.

In conclusion, I endorse the proposals of Title VII as long-needed improvements to the administration of our national Immigration policy.

Thank you for letting me voice my views.

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[4] *See* 28 U.S.C. § 48(a).

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March 16, 2006

Via email
Senator Arlen Specter
SH-711 Hart Senate Office Building
Washington, DC 20510-3802

Re: Judicial Review Concerns in Chairman's Mark of Immigration Reform

Dear Senator Specter:

This letter represents the concerns of Lenni Benson, professor of law at New York Law School, and Stephen Yale-Loehr, adjunct professor of immigration law at Cornell Law School. We each have been teaching and/or practicing immigration law for more than 20 years. We each have written extensively about judicial review of removal orders and other related immigration decisions.

This letter addresses our concerns about certain provisions in your Chairman's Mark (EAS06090) that would change judicial review of immigration matters. In particular, we believe that:

- Judicial review of immigration decisions should not be moved to the U.S. Court of Appeals for the Federal Circuit until more careful thought has been given to this major proposed change.
- Judicial review should be preserved for motions to reopen and reconsideration.
- Allowing one judge on the Federal Circuit to decide whether a case should go forward raises serious problems.
- Judicial review should be preserved in naturalization cases.

Incremental Change May Be Wiser Than Broad Scale Reorganization

Section 701 of the bill proposes moving judicial review of removal orders to the U.S. Court of Appeals for the Federal Circuit. Other provisions of the bill would preserve habeas corpus in the federal district courts for detention-related decisions. There may be cases where judicial review might involve both courts. Thus, these provisions need more careful consideration of the interaction between them.

We oppose the centralization of all petitions for review in the Federal Circuit for several reasons. First, Congress already has shortened the time period for filing a petition for review to 30 days. Thus, judicial review is not an important reason for delays in removing

noncitizens from the United States. Congress has authorized the removal of noncitizens even when a petition for review is pending. Rather, the Department of Homeland Security (DHS) simply lacks the resources to execute many final removal orders. Congress should not obscure this issue by suggesting that litigation delay frustrates the removal of noncitizens.

Second, the short time for filing a petition for review and for seeking a discretionary stay of removal with the Federal Circuit will cause problems for noncitizens. The extra time it will take to transmit those petitions from throughout the country disadvantages individuals and may make it difficult to find legal representation. It may make it particularly difficult for counsel to participate in settlement negotiations or to provide supporting documentation for motions seeking stays. Many attorneys unfamiliar with the Federal Circuit may decline to represent noncitizens seeking review there.

Third, centralization of judicial review should not occur yet because recent jurisdictional changes have not been fully integrated or understood. Last May, as part of the Real ID Act, Congress made a major shift in restoring the petition for review for certain classes of noncitizens, and transferred many pending matters from district courts to the circuit courts of appeals. There are ongoing questions about the scope of the transfer provisions and which matters should be included within a petition for review versus those that are appropriately considered in the district courts. This is a longstanding issue in immigration law because many government actions occur outside the scope of a removal hearing but could be and usually are ultimately going to affect the rights and benefits of an individual subject to removal. The federal courts have not had sufficient time to adjust to the changes brought by the Real ID Act.

Fourth, the Federal Circuit lacks expertise in immigration law. Nor are the judges on that court knowledgeable about criminal law, which applies to many immigration removal cases. Lacking such expertise, Federal Circuit judges may take longer to decide immigration appeals than their counterparts on the circuit courts of appeals.

Judicial Review Should Be Preserved for Motions to Reopen and Reconsideration

Section 708 would commit decisions about whether to reopen or reconsider an immigration case to the Attorney General's discretion. This provision would trigger INA § 242(a)(2)(B)'s limitation of judicial review over discretionary decisions. By contrast, the current statute authorizes federal court review if the BIA denies a motion to reopen or reconsider. The current case law makes clear that courts defer to the immigration agency's action in the vast majority of cases. A court will generally order a remand only if the noncitizen proves that the agency made a statutory or constitutional error. Even if Congress tries to further restrict judicial review of these motions, it is likely that federal courts will continue to hear cases that are characterized as constitutional challenges.

We urge you to preserve judicial review of motions to reopen or reconsider. Such motions often arise because the individual has a claim for relief, incompetence of prior counsel, changed country conditions, or an error by the government inappropriately prevented the individual from relief.

If Congress believes that too many motions to reopen or reconsider are being filed, we urge you to first allow an empirical assessment of such motions before making any changes.

Judicial Review Requires Parity for Both Parties

Section 707 provides that once a petitioner's brief is filed, it would be assigned to a single Federal Circuit judge. Unless that judge issues a "certificate of reviewability," the petition would be denied and the

government would not need to file a brief supporting the removal order. No certificate of reviewability could be issued unless the petition provided a "prima facie" case that the petition should be granted.

This proposed process raises several concerns. First, this provision would not provide for any internal system of reconsideration or review. This interference with judicial independence will undoubtedly create litigation concerning the separation of powers. Second, it does not provide an equal opportunity for the government to participate in the court's deliberations. Many judges may be uncomfortable acting without participation of both parties. Third, Federal Circuit judges have no prior immigration experience and are not well prepared to assess the prima facie validity of a petition for review without the benefit of briefing from the government.

If the goal of this provision is to allow a single judge to reach a decision about the likelihood of success on appeal, Congress might consider adopting a pre-screening mechanism. Alternatively, the federal courts of appeals could develop internal processing and efficiency procedures. Individual judges facing the strict time deadlines set forth in section 707 might certify more cases than they otherwise would under a different procedure. Alternatively, the government may find that after a judge has devoted significant energy to certifying an appeal, they have a uphill battle and that the government would be better served by stipulating to a remand to the Board of Immigration Appeals (BIA). We believe many unintended and unpredictable consequences may result from such a dramatic alteration in appellate practice and procedure.

Judicial Review Corrects Wrongs

We know that Congress appreciates how important removal proceedings are to individuals facing removal. We are sure your office also receives many calls from U.S. relatives and employers of noncitizens facing removal, many of whom may have been permanent residents for many years. The American people believe our nation is a governed by the rule of law and that important life changing decisions are not made by nameless and faceless bureaucrats. Judicial review helps to foster respect for the immigration system.

Judicial review can also help to protect the many noncitizens who are not represented. The BIA recently reported that unrepresented individuals constituted nearly 13,000 of their total case load of approximately 42,000 matters. There has also been an increase in the number of children in immigration proceedings. The agencies have special duties of care in the consideration of juvenile cases, and the courts are essential guardians of the rights of these children.

We have not had an opportunity to study the overall rate of remands. However, we do have one snapshot about the rate of reversal. Recently the U.S. Court of Appeals for the Second Circuit instituted a new procedure that bypasses oral argument for most asylum appeals. The Second Circuit adopted these procedures to allow it to more efficiently handle the increased volume of immigration appeals. These new procedures started in October 2005. The cases are considered by panels of three judges, with assistance from specialized court staff. In a review of 589 asylum decisions decided under these non-argument rules, more than 17% resulted in a remand to the BIA. While this rate of reversal indicates that many cases do not need a remand, a 17% reversal rate still indicates that many people had legal claims that were not properly addressed by the agency.

Moreover, we are sure that you appreciate the type of cases where the courts do reverse the agency. For example, courts have recently held that the DHS did not adequately consider claims of religious persecution in asylum cases. These opinions echo the findings of an independent commission Congress created to review the expedited removal system, a system that lacks judicial review for most of its determinations. If there is no watchdog, mistakes occur. These mistakes may also frustrate the intent of Congress.

Judicial Review is Essential in Naturalization Cases

Section 204 of your Chairman's mark would limit judicial review of naturalization decisions. To put the naturalization process solely into the hands of the executive branch would make it more likely to be attacked by whichever political party is not currently in office. The watchdog role of the courts to ensure equal and fair treatment of individuals is one of the greatest strengths of our democracy. If we eliminate judicial review in these important cases, we invite cynicism and political grandstanding in an area that should be immune from partisan politics.

Moreover, there has been a low rate of judicial review in naturalization cases. There is no compelling reason to justify such a radical departure from the centuries-old tradition of openness in our society's most important rite of passage--the full incorporation of newcomers into our society.

Even if Congress believed more limits were necessary on the jurisdiction of the federal courts to review aspects of the naturalization process, the current bill simply invites federal courts to preserve their constitutional role by characterizing challenges to agency decisions as challenges that present constitutional issues. The constitutionalization of such litigation raises the stakes for the government and can result in courts imposing new procedures onto agency adjudication in an effort to preserve fairness and accuracy in decisionmaking.

Conclusion

We are happy to provide more detail to you or your staff on any of these issues. We understand the challenges you face in implementing our immigration laws. We appreciate the opportunity to present these comments.

Sincerely,

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This letter expresses our own personal opinions and does not necessarily reflect the views of our law schools.

pc: Other Judiciary Committee members

CENTER FOR GENDER & REFUGEE STUDIES
UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW

March 21, 2006

Senator Arlen Specter, Chair
United States Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

Subject: Comprehensive Immigration Reform Act of 2006 (Senator Specter's Mark)

Dear Senator Specter:

We are writing to express our concern about the devastating impact that the Comprehensive Immigration Reform Act of 2006 will likely have on vulnerable groups of people, including asylum-seekers, children, trafficking victims, and others seeking protection in the United States. As recognized experts on asylum issues, at CGRS we are playing a central role in advising attorneys on gender asylum issues, and tracking cases to inform national policy work on the issue. Based on our experience we believe that the enactment of provisions that would limit judicial review of administrative agency denials, criminalize unlawful presence, and impose mandatory detention, while negatively affecting all immigrants, would have particularly serious adverse consequences for asylum seekers and others seeking protection in the U.S.

Limiting Access to the Courts and Inhibiting the Development of the Law

Eliminating Circuit Court Jurisdiction Over Immigration Cases

Section 701 of the bill proposes shifting jurisdiction over judicial review of agency denials from the U.S. Circuit Courts of Appeals to the U.S. Court of Appeals for the Federal Circuit. While it provides for some increase in staffing at the Federal Circuit (from 12 judges to 15), it would be unreasonable and unworkable to channel the entire volume of appeals currently being handled by 11 circuit courts all over the country to a single court, especially one whose experience is mainly in patent and copyright law and not in immigration law. The bottleneck that such a change would create, to say nothing of the ensuing administrative and jurisprudential crisis (it remains unclear, for example, whether the Federal Circuit would apply the precedents established in other circuit courts, or whether it would it create "new" jurisprudence) would essentially eviscerate judicial review for many immigrants.

Section 701 would also make access to federal courts difficult for immigrants and their attorneys, many of whom are non-profit organizations or are representing their clients pro bono, thereby making attorneys less willing to take on federal appeals and exacerbating the shortage of counsel already faced by asylum seekers.

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Additionally, section 701 would adversely impact the development of immigration law. While it is appropriate to have a specialized court hear complex and scientific questions such as those involved in patent and copyright law, the same rationale cannot apply to immigration cases, where the range and breadth of issues benefits from the broader experience of the federal appellate judges at the circuit courts around the country.

Federal courts have traditionally played a key role in rectifying mistakes made by lower level judges and the Board of Immigration Appeals (BIA) and ensuring that asylum seekers receive a full and fair consideration of their claims. Recently, in *Garcia-Martinez v. Ashcroft*, a case involving a Guatemalan woman who had been gang-raped by government soldiers during the civil war in her country, the Ninth Circuit reversed the finding of an Immigration Judge and the BIA.[1] The court found that, in the context of war, "rape is not about sex; it is about power and control," and it is sometimes "used to intimidate a civilian population perceived to be in political opposition to the armed force in question." Without meaningful federal court review, Ms. Garcia-Martinez would have been denied asylum.

The role of the federal courts in reviewing immigration cases became even more important in light of procedural rules adopted by Attorney General Gonzales in 2002, which sharply curtailed the review of Immigration Judge denials by the BIA, and resulted in a significant increase in the number of cases being appealed to the federal courts. In January 2005, recurrent criticism by federal judges of the quality of adjudication by the administrative agency prompted Attorney General Gonzales to order a comprehensive review of the Immigration Judges and the BIA. In light of these developments, a drastic change such as that proposed in section 701 should not be adopted without careful consideration and debate.

Creating a Pre-Screening Process for Judicial Appeals

Section 707 of Senator Specter's Mark further limits the access of immigrants to judicial review by creating a pre-screening process that would require all cases to be vetted by a single Federal Circuit judge after the filing of the opening briefs. Unless the judge issues a "certificate of reviewability" within 60 days, the case would be summarily dismissed and no appeal of this single judge's decision would be permitted. In no other area of the law is the right to access the federal circuit courts limited in this manner. Given the high stakes involved in these cases – sending people back to a country where they may face death or other serious harm – it seems especially troubling that the right to appeal should be so sharply restricted. To the extent that this unprecedented curtailing of a basic due process right arises from a concern about the number of BIA cases being appealed, it would seem that reform aimed at the BIA's new procedures would be a fairer and more targeted approach. We appreciate Senator Specter's efforts to address some of the problems created by the 2002 BIA procedural rules by reinstating a three-member review of appeals and increasing the number of board members, and believe that the positive changes that may result from section 712 and from the ongoing internal review of the administrative agency may obviate the need for such measures at the federal court level.

Section 707 will also create tremendous pressure on an overburdened court to review cases within the 60-day deadline. It would unfairly penalize petitioners whose cases do not get decided within

[1] 371 F.3d 1066 (9th Cir. 2004).

the 60-day period, resulting in automatic dismissal, again with no option for further review.

Sections 701 and 707 create a second-tier system of justice for immigrants that is completely inconsistent with our tradition of providing access to courts and ensuring that people are not subjected to harsh penalties without adequate judicial oversight.

Dramatically Increasing Criminal Penalties

Section 203 of the bill dramatically and retroactively expands the definition of an aggravated felony, thereby increasing the grounds for which an asylum seeker may be automatically barred from asylum and/or withholding of removal. Moreover, it would strip the Department of Homeland Security and the Department of Justice of the ability to waive the bar for people who are able to demonstrate compelling reasons for being allowed to adjust status. Under this provision, a trafficking victim who manages to escape from her traffickers and subsequently helps a friend who was also trafficked to escape and find a place to stay could be barred from relief. This provision would result in the deportation of many refugees who face a threat to their life or freedom, in complete violation of our obligations under domestic and international law.

Section 206 of the bill makes knowing unlawful presence in the U.S. for even a single day not just a criminal offense but, under some circumstances, an aggravated felony, thus barring an applicant from asylum and, in some instances withholding of removal. This provision would unfairly penalize asylum seekers who arrive in the U.S. without inspection or with temporary visas, are disoriented and traumatized by the abuse and torture they have escaped, and whose first natural priority is to feel safe and secure before confiding their story to an attorney or government official who may be able to help them. Many asylum seekers face additional linguistic and educational barriers that make it harder for them to understand the asylum system, and also frequently lack the financial means to obtain assistance with their claims. Section 206 does not take into account any of these human factors that cause bona fide refugees to enter without, or fall out of, legal status.

Imposing Mandatory Detention

Section 202 of Senator Specter's Mark would authorize the detention of immigrants whose cases are on appeal to the federal courts. This provision, which does not allow for an individualized assessment of the necessity for detention, would have severe adverse consequences for asylum seekers. According to a February 2005 study conducted by the bipartisan U.S. Commission on International Religious Freedom (USCIRF), the harsh aspects of detention for persons who have suffered severe and sometimes recent trauma prior to their detention represent a form of "re-traumatization."[2] Additionally, the USCIRF report concluded that the incarceration caused many of them to break down and decide to risk death or other harm in their own country than to remain in indefinite detention in the United States. The United Nations High Commissioner on Refugees has also stated that the detention of asylum seekers is "inherently undesirable" because it can have severe psychological consequences for people who have already suffered trauma and abusive treatment in their home countries.[3]

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[2] U.S. Commission on International Religious Freedom, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL (February 8, 2005).

[3] UNHCR, Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers ¶ 1 (February 1999).

also stated that the detention of asylum seekers is "inherently undesirable" because it can have severe psychological consequences for people who have already suffered trauma and abusive treatment in their home countries.[3]

In 1994, Fauziya Kassindja, a 16-year-old woman from Togo, Africa, fleeing genital cutting and forced polygamy, was placed in detention upon her arrival in the U.S. She remained in INS detention for over a year and a half under harsh conditions, during which she was shuttled between four INS detention facilities and jails. After spending approximately one year in detention, during which she experienced severe physical and psychological ailments, she requested the INS to let her go back to Togo and suffer the fate that awaited her, rather than spend another day in U.S. prisons. Her attorneys were able to persuade her to reconsider this request and to pursue her asylum claim, and she was ultimately released and granted asylum.

Fauziya's case provides a clear example of the fact that the mandatory detention proposed in this legislation could cause bona fide asylum seekers to abandon their claims. Under section 202, however, asylum seekers could remain in detention for prolonged periods of time with no recourse. We are aware of numerous tragic cases of women fleeing violent abuse in their home countries who, due to the trauma, separation and stress of indefinite detention, were unable to sustain themselves for the duration of their lengthy appeals and who abandoned their asylum claims for an uncertain fate at home. For those without representation, it may become even harder to continue to pursue their appeals. Moreover, in conjunction with section 701, the detention of asylum seekers would exacerbate the challenges of finding legal representation or of representing themselves.

We recognize that there is a need to reform the immigration system. However, legislation that fails to contain safeguards and ensure due process for vulnerable groups seeking protection in the U.S. is not just bad policy. It is a radical departure from our tradition as a safe haven for those fleeing tyranny and oppression in their home countries. With the number of refugees arriving in the United States now down dramatically over the past five years,[4] we urge you to reconsider these and other provisions that impact refugees and to address the refugee-related issues in a realistic and fair manner.

Sincerely,

Karen Musalo
Director

Stephen Knight
Deputy Director

Leena Khandwala
New Voices Fellow

[3] UNHCR, Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers ¶ 1 (February 1999).
[4] Ruth Ellen Wasem. U.S. Immigration Policy on Asylum Seekers (CRS Report RL32621), January 27. 2006; BBC News, *Asylum numbers 'continue to fall*, March 17, 2006.

Department of Justice

STATEMENT

OF

JONATHAN COHN
DEPUTY ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

"IMMIGRATION"

PRESENTED ON

APRIL 3, 2006

Testimony of Jonathan Cohn
Deputy Assistant Attorney General, Civil Divison
United States Department of Justice

Before the Committee on the Judiciary, United States Senate

Concerning Immigration

April 3, 2006

The Department of Justice appreciates the opportunity to address the provisions that were in Title VII of the Chairman's mark, which is the subject of today's hearing. Comprehensive immigration reform is unquestionably necessary, and the Department commends the entire Committee and particularly the Chairman for undertaking such a tremendous legislative effort.

The Department strongly supports the much needed reforms that were part of Title VII-A of the legislation. They are an appropriate and reasonable response to the overwhelming floodtide of immigration cases that has swamped the federal courts and the Executive Branch. We applaud their inclusion in your original Chairman's mark, and strongly urge that they be incorporated into the final bill that passes the Senate. None of these provisions deprives an alien of his day in federal court, and nothing will limit or affect the full three-stage agency review currently available to most aliens. Instead, the provisions simply provide a sensible mechanism for screening out the many meritless cases that aliens file to delay removal, and they would thus allow the courts to focus on the more complex cases that warrant closer scrutiny. Without these reforms, aliens deserving of relief are unjustly delayed.

However, with all due respect to the Chairman, the Department strenuously opposes central elements of Title VII-B. Though well-meaning, this provision would insulate adjudicators in the Executive Office for Immigration Review (EOIR) from Executive Branch oversight or supervision. Immigration is a quintessential sovereign function, inextricably intertwined with national security and foreign policy. For this reason, the power to decide immigration cases and to develop policy through adjudication should not be transferred to unaccountable agency officials. We hope that we can work with you to alleviate any concerns that you may have been seeking to address with this proposal without taking such an unwarranted step.

Finally, the Department respectfully proposes two additional reforms that would help stem the tide of immigration litigation. Both of these reforms seek to remedy court decisions that are inconsistent with the plain text of the Immigration and Nationality Act (INA).

I. THE DEPARTMENT SUPPORTS VIRTUALLY ALL OF TITLE VII-A.

The Department supports virtually all of the provisions in Title VII-A of the Chairman's Mark, which are measured responses to the exponential growth in immigration litigation. By way of background, there has been a 603% increase in the number of Board of Immigration Appeals (BIA) decisions appealed to the federal courts since fiscal year 2001 (according to the Administrative Office of the U.S. Courts). Whereas only 1,757 cases were appealed in 2001, 12,349 were challenged in 2005. In the Second Circuit alone, there has been a staggering 1400% increase in the number of BIA appeals, and in the Ninth Circuit, over 40% of all cases are now immigration appeals.

A. Consequences of the Floodtide of Immigration Cases

As a result of this increase of cases, which is due to stepped-up enforcement efforts by the Department of Homeland Security and the rapid rise in the rate at which aliens have appealed BIA decisions (from 6% in fiscal year 2001 to 29% in fiscal year 2005), there have been two predictable and equally undesirable consequences: first, a tremendous expenditure of resources and, second, delay in adjudicating immigration cases in the federal courts. On the issue of resources, the Department has been required to write opposition briefs in thousands of additional immigration appeals, many of which lack any merit and most of which are ultimately resolved in favor of the government. Unfortunately, under the current system, even cases that are devoid of merit often impose a significant burden on the Department because of the fact-specific nature of the typical claim and the time it takes to digest a several-hundred page record.

Moreover, to spread out this burden, the Department has been compelled to assign thousands of immigration cases to attorneys throughout the Department. Before 2002, the Civil Division's Office of Immigration Litigation and the U.S. Attorney's Office for the Southern District of New York handled nearly all of these matters. Since November 2004, however, the Department has had no choice but to seek assistance from lawyers in all of the litigating components, all of the United States Attorneys' Offices, and many non-litigating components as well.[1] Pursuant to a directive from the former Deputy Attorney General, virtually every office in the Department has been tasked with writing at least some immigration briefs.

Among the consequences of this brief-distribution program is that overworked attorneys throughout the Department have even less time to dedicate to their own pressing matters than they did before. Criminal prosecutors in the United States Attorneys' Offices have to focus on meritless removal cases in addition to their criminal prosecutions, diverting precious prosecutorial resources. Attorneys in the Civil Rights Division have had to juggle immigration cases along with all of their efforts to enforce

[1] Indeed, over the past year, the Department has also received help from another federal agency, the Federal Deposit Insurance Corporation, which has graciously agreed to detail several of its attorneys to the Department's Office of Immigration Litigation.

the Nation's civil rights laws. And lawyers in the Environmental and Natural Resources Division have had to split their time between protecting the environment and responding to time-consuming but ultimately unsuccessful claims of illegal aliens simply seeking to delay their removal.

Moreover, the wide distribution of cases also makes it more difficult for the Department to maintain a consistent litigating position on substantial issues, including eligibility for asylum and the scope of federal court jurisdiction.

In addition to the resource issue, another deleterious effect of the exponential growth in immigration litigation is delay – delay from the courts that are trying their best but struggling under the weight of thousands of new cases and delay from Department attorneys who understandably must request successive extensions to keep pace with the unprecedented growth of immigration litigation. Since 2001, all but two of the circuit courts have seen their case-processing times for BIA appeals increase significantly, with the Second Circuit experiencing the largest delays. In that court, according to the Administrative Office of the U.S. Courts, processing times for cases resolved on the merits have increased 171%, and it now takes almost 27 months to resolve a BIA appeal.

Without question, this is a problem that must be solved. An immigration system that survives only with delay is at odds with immigration enforcement. As the Supreme Court has recognized, "every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *INS v. Doherty*, 502 U.S. 314, 321-325 (1992). Delay serves to reward illegal aliens and encourage additional illegal crossings. Even worse, it creates extra incentives for even more meritless appeals—thereby perpetuating a cycle of more litigation, more delay, and more reason to enter the country illegally.

Delay can also be harmful to aliens seeking and deserving legal status. Because they have to wait longer for an adjudication of their claims, they are without lawful status—and the benefits associated with that status—for a longer period of time. These aliens may be unable to work lawfully, travel abroad, or pursue an education. Finally, delay in the courts affects litigants in non-immigration cases as well, because courts have to divert resources from these cases to BIA appeals.

B. Title VII-A Would Help Reduce the Volume of Immigration Cases

The provisions in Title VII-A would serve to reduce the delay and alleviate the burden on Departmental and judicial resources. Perhaps the most critical provision is section 707, which would require aliens to obtain a certificate of reviewability (COR) from a federal judge in order to pursue his appeal. If the judge denies the COR, the government does not have to file a brief, and the alien may be removed without additional time-consuming and unnecessary proceedings.

Section 707 is modeled after a statute applicable in the criminal habeas context, 28 U.S.C. § 2253, which likewise requires a party to obtain a certificate before pursuing

an appeal. Section 2253 originated in a bill that Senators Specter and Hatch introduced, *see* S.623 (1995), and it has been invaluable in reducing the number of frivolous habeas appeals and allowing courts to focus on the cases that have substantial merit. To obtain a certificate in the habeas context, the petitioner must make a "substantial showing" of a denial of a constitutional right. By analogy, to obtain a COR, an alien should be required to make a "substantial showing" that his petition for review will be granted. In light of the fact that section 2253 applies to United States citizens (as well as aliens), and it applies to criminal cases in which the consequence of an erroneous determination might be life imprisonment or death, there is no reason not to adopt a similar requirement in the immigration context. Illegal aliens should not be given more access to our federal circuit courts than United States citizens on death row.

Unfortunately, section 707 in the Chairman's mark included a lower threshold for obtaining a COR – requiring an alien to set out only a prima facie case. This minimal standard would be inconsistent with the requirement in section 2253 and could be insufficient in screening out meritless cases and allowing courts to focus on the more complex matters. Accordingly, we recommend that the standard in section 707 require an alien to make a substantial showing that his petition for review will be granted.

It is important to note that section 707 would not close the courthouse doors to any alien. Every single alien would still have his day in court in front of an Article III judge, in addition to the multiple layers of agency review that are currently available. Indeed, the typical alien has three layers of agency review – an initial determination by the Department of Homeland Security, another determination by an immigration judge, and then a third determination by the BIA. As a result of these multiple layers of agency review, over 131,000 aliens were granted asylum from the agencies in Fiscal Years 2001 through 2005 without any court involvement whatsoever. Section 707 nonetheless provided for the courts as an additional forum for pursuing relief.

It has been said that section 707 is ill advised because the adjudicators in the Department of Justice are doing an inadequate job of deciding cases and a full three-judge panel in the federal courts is needed to make up for the Department's deficiencies. But the only evidence supporting this argument is the reversal rate in a single circuit court that hears no more than 2% of the total number of appeals from BIA decisions. In that court, the BIA was reversed (or had its decisions remanded) last year in 39% of the cases in which the court reached the merits of the case. The nationwide average, however, was only *14%*, as calculated by the Administrative Office for the U.S. Courts. That means that the BIA was reversed in only one of every seven cases in which the court reached the merits. Indeed, no court (other than the Seventh Circuit) reversed the BIA in one of five cases, and the Second, Fourth, Tenth, and Eleventh Circuits reversed the BIA in roughly one of twenty cases in which the court reached the merits. Even the Ninth Circuit, which is often viewed as being more receptive to aliens' claims than the average court,[2] reversed the BIA in only 17% of the cases decided on the merits.

[2] According to Judge Posner, the Ninth Circuit's "hostility to the Board of Immigration Appeals is well known . . . and doubtless explains the large number of Ninth Circuit immigration cases reversed by the Supreme Court." *Stroe v. INS*, 256 F.3d 498, 503 (7th Cir. 2001).

Moreover, to say that the court reversed the BIA 14% of the time overstates the reversal rate for two reasons. First, the 14% figure reflects only those cases that were terminated on the merits. It does not account for all of the aliens' appeals that were dismissed on procedural grounds before the case even reached a three-judge panel. According to the Administrative Office for the U.S. Courts, last year, 60% of all BIA appeals were dismissed on procedural grounds. Because most of these cases were resolved against the alien—for instance, because he filed in the wrong court or filed out of time or failed to pay the filing fee—the BIA's actual reversal rate was substantially lower than 14%. The Administrative Office for the U.S. Courts does not calculate this figure, but according to statistics tracked by the Civil Division of the Department of Justice, the Government prevailed in 91.5% of its immigration cases last year (and thus incurred reversals or remands in only 8.5% of the cases), which is consistent with its percentage in 2004 (92.9%), 2003 (91.2%), and 2002 (89.7%), and noticeably higher than its percentage in 2000 (83.1%).[3] From 1983 to 2005, the Government prevailed in 89.9% of its cases. Because of this consistent success rate—which confirms the lack of merit of most aliens' appeals—there is no reason to reject sensible jurisdictional provisions that are consistent with steps taken in the habeas context.

Second, most BIA decisions, about 70%, are not appealed to the federal courts. And an even larger percentage of the roughly 265,000 decisions by immigration judges are never challenged in the federal courts. By way of comparison, the federal courts reversed or remanded to the Department's adjudicators in only 556 cases in 2005. Accordingly, there is no support for the proposition that the Department's adjudicators are doing an inadequate job of deciding cases or that a full three-judge panel in the federal courts is needed to make up for any Departmental deficiency.

Finally, another provision in Title VII-A that is worth noting is section 708, which would limit review of discretionary denials of motions to reopen. The Supreme Court has long recognized that motions to reopen are disfavored and that the government should have broad discretion to deny such motions. *Doherty*, 502 U.S. at 323; *INS v. Abudu,* 485 U.S. 94, 107-08 (1988); *INS v. Rios-Pineda*, 471 U.S. 444, 446 (1985). Nevertheless, while current law makes discretionary determinations unreviewable, a loophole in the statute provides for judicial review of motions to reopen when the BIA denies them as a matter of discretion. By eliminating this loophole, for which there is no justification, section 708 would free up scarce judicial resources and allow courts to focus on serious legal and constitutional claims.

II. THE DEPARTMENT OPPOSES CENTRAL FEATURES OF TITLE VII-B.

With all due respect to the Chairman, the Department of Justice strongly opposes central features of the draft legislation that previously constituted subtitle VII-B of the Chairman's Mark.

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[3] The Civil Division's numbers do not track cases delegated to elsewhere in the Department, and they do include the relatively small number of cases that are appealed from district court decisions. Neither factor is material.

The relevant provisions of the legislation would largely insulate EOIR's adjudicators from any supervision or oversight. The Director of EOIR (the office that contains the BIA and immigration judges), rather than the Attorney General, would have the ultimate authority to appoint the immigration judges and the immigration appeals judges on the BIA. Moreover, although the Director would have the authority to select and supervise the BIA chair, he would be unable to discipline or remove immigration judges or immigration appeals judges for exercising "independent judgment and discretion." In addition, neither the Director nor any other officer subject to the President's supervision would be able to review or revise the BIA's final decisions. Instead, those decisions would be binding on the Executive Branch and reviewable only by the Court of Appeals for the Federal Circuit.

As should be evident from the foregoing, the draft legislation would transfer authority to determine which aliens will be allowed to stay in the United States to government officials insulated from direction, supervision or control by any politically accountable officer. This situation would be fundamentally at odds with the relationship between immigration decisions and the national security and foreign policy of the United States—a relationship that the courts have long recognized. *See Hampton v. Mow Sun Wong*, 426 U.S. 88, 104 (1976); *Knauff*, 338 U.S. at 542; *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892). Moreover allowing the government to seek judicial review from these decisions is no substitute for this kind of supervision, given the nature of the decisions involved.

Indeed, in the INA, Congress itself has acknowledged the inextricable connection between immigration policy, national security, and foreign policy. The INA confers broad discretion on the Attorney General and the Secretary of Homeland Security to base determinations of aliens' admissibility or removability on numerous considerations of foreign affairs and national security. For example, in deciding whether to grant asylum, the INA calls for consideration of, among other things, whether there are reasonable grounds for regarding an alien as a danger to the security of the United States, INA § 208(b)(2)(A)(iv); whether an alien convicted of a particularly serious crime constitutes a danger to the community of the United States, INA § 208(b)(2)(A)(ii); and whether there are serious reasons to believe the alien has committed a serious nonpolitical crime outside the United States prior to arrival, INA § 208(b)(2)(A)(iii).

The debates surrounding the immigration reform bills now pending in the Senate reflect the fundamental importance of controlling the nation's borders and enforcing our Nation's immigration laws. The draft legislation in subtitle VII-B of the Chairman's Mark would give unelected and unaccountable officials the final discretionary authority over these efforts in any given case. That would be a grave mistake, and thus the Department of Justice strongly opposes this proposal.

In addition, the Department opposes this section of the legislation for at least two additional reasons as well. First, it would erode the Executive's constitutional responsibility to manage and implement immigration policy and would run afoul of the

Appointments Clause. Second, it is premature. At the Attorney General's direction, the Deputy Attorney General and Associate Attorney General are in the process of conducting a comprehensive review of EOIR. The draft legislation would overhaul EOIR without the benefit of this review.

A. Background

Before going into these reasons in further detail, it is important to clarify the role of the immigration judges and the BIA under current law. For over fifty years, the authority to determine the admissibility and removability of aliens has been statutorily committed to the Attorney General and, since enactment of the Homeland Security Act of 2002, the Secretary of Homeland Security as well. The Attorney General's discretion under the INA has long been delegated to subordinate officers—immigration judges and members of the BIA—but he has always retained the authority to supervise, appoint, and remove any of these officers and to revise their decisions. That makes sense, because these officials are exercising Executive authority ultimately vested in the Attorney General. It should also be noted that the Supreme Court concluded, in *Marcello v. Bonds*, 349 U.S. 302 (1955), that there was no due process violation in entrusting a deportation hearing involving a lawful permanent resident (who had lived in the United States for 44 years) to a special inquiry officer subject to the supervision, direction, and control of the Attorney General and the INS.

To be sure, the Attorney General has needed to directly involve himself in adjudicating immigration cases only rarely. When he has done so, it has been to ensure that the INA is being properly applied and that the discretion that the law provides is being wisely exercised—often at the request of the BIA or the Secretary of Homeland Security.[4] Indeed, over the last fifteen years, the Attorney General has personally reviewed only 25 out of the 422,000 cases that have been decided. Of those 25 cases, the Attorney General himself initiated certification in only eight, with the rest being certified by the Secretary of Homeland Security (or by the INS Commissioner before 2002) or the BIA itself.[5] Although the Attorney General rarely needs to involve himself directly in

[4] When the Attorney General involves himself in an immigration decision, he does so (pursuant to longstanding regulation) only after the decision has been rendered by an immigration judge and reviewed by the Board of Immigration Appeals. At that point, the Attorney General certifies the Board's decision to himself.

[5] Attorney General Gonzales has certified only one case. He certified the case in February and has not decided it yet. The case involves an alien who is mentally ill and was convicted of repeatedly raping a 55-year-old woman. The Board of Immigration Appeals upheld the decision of an immigration judge finding the alien entitled to protection from removal to the Dominican Republic under the Convention against Torture. The immigration judge concluded that, if the alien were removed, he probably would not take his medication, come to the attention of the police, and would therefore probably be arrested and incarcerated in a Dominican prison, where abuse of the mentally ill is reportedly common. The Board's affirmance of the grant of protection prevents the United States from removing this individual to the Dominican Republic. Given that there is no other country likely to take him, if the decision stands, the Supreme Court's decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001), will require DHS to release him into the American public regardless of how dangerous he may be. The Attorney General took this case to determine whether the Board acted properly in barring removal.

adjudications of removal orders, his ability to do so in specific, highly sensitive cases is critical, and his authority to do so generally is essential to maintaining a consistent interpretation of the INA at the administrative level.

With this legislation, the nature of immigration judges and BIA members would be radically redefined. Rather than acting for the Attorney General and under his guidance, review, and supervision, these individuals would now be exercising their discretion without any politically accountable supervision or review whatsoever.

B. Constitutional Constraints

By insulating immigration judges and the BIA from the direction and control of the President and other Executive Branch officials, the draft legislation would transfer core executive powers to unelected and unaccountable officials. This is of doubtful constitutionality under basic principles of separation of powers. The Supreme Court has stated that the "exclusion of aliens" stems "not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." *Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950). Giving the BIA the power to issue decisions that bind the President on issues of foreign policy or national security would raise serious separation-of-powers concerns. The President's position at the head of the Executive Branch demands that he have the ability to oversee decisions of subordinate officers that implicate such core Article II functions. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936); *Dep't of Navy v. Egan*, 484 U.S. 518, 529 (1988); *Harlow v. Fitzgerald*, 457 U.S. 800, 812 n.19 (1982).

The discretionary character of many decisions under the immigration laws, as noted above, further underscores the constitutional importance of vesting responsibility for their implementation in the Executive. *See supra* at 6; *see, e.g.*, INA § 208(b)(2)(A)(iv) (discretion to determine whether there are reasonable grounds for regarding the alien as a danger to the security of the United States). The Supreme Court has upheld broad legislative grants of discretionary authority to admit and exclude aliens against non-delegation challenges exactly because of the political accountability of the Executive. *See Mahler v. Eby*, 264 U.S. 32 (1924). The broad grants of discretion in the INA would be much more vulnerable to attack, however, if the delegation were to unaccountable adjudicators.

Specific provisions of the draft legislation would also violate the Appointments Clause of the Constitution. The legislation would require the President's appointment and the Senate's confirmation of the director of EOIR and would provide that the current director serve as acting director until he or a successor is so appointed. Congress lacks the authority, however, to remove officers of the Executive Branch except through either the bona fide abolition of their office or their impeachment and conviction. *See Myers v.*

Additionally, the BIA itself recently certified a case to the Attorney General involving an individual suspected of terrorist activities but to whom the immigration judge granted asylum. The Attorney General has not made a final decision yet on whether to accept this case for review.

United States, 272 U.S. 52, 122 (1926). Congress may not accomplish the removal of an officer by ostensibly abolishing an office while simultaneously recreating it and requiring a new appointment. *See Constitutionality of Proposed Legislation Requiring Renomination and Reconfirmation of Executive Branch Officers Upon the Expiration of a Presidential Term*, 11 Op. O.L.C. 25, 26 (1987). Such "ripper" legislation impermissibly forces a duly appointed official to seek Senate consent in order to stay in office.

In addition, the legislation would require that current members of the BIA and current immigration judges be appointed to their newly created statutory positions and serve for limited, staggered terms. Congress may not direct the appointment of an executive official; the Constitution grants that power to the President and other officers alone. *See Civil Service Commission*, 13 Op. Att'y Gen. 516, 520-21 (1871). Nor may Congress impose fixed terms on officers currently serving without limitation, for that would "amount[] to an attempt on Congress's part 'to gain a role in the removal of executive officials other than its established powers of impeachment and conviction.'" *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 170-71 (1996) (quoting *Morrison v. Olson*, 487 U.S. 654, 686 (1988)).

C. The Attorney General's Comprehensive Review

Finally, the Attorney General's authority over EOIR is not only important for reasons of national security and separation of powers principles; it is also valuable to the management and quality control of EOIR's output. On January 9, the Attorney General launched a comprehensive review of EOIR's operations and work product. The review is still underway and should be completed shortly.

The draft legislation would prematurely restructure EOIR and even modify the streamlining procedures before the review is complete. This approach is problematic for two reasons. First and foremost, it would be a profound waste. Lawyers from the offices of the Deputy Attorney General and the Associate Attorney General have expended substantial time, effort, and resources over the last three months gathering information from the BIA and immigration judges around the country. This information will be compiled and used to formulate recommendations to the Attorney General on proposed reforms of EOIR's operations. The draft legislation would proceed without the benefit of either the information that has been gathered or the recommendations based thereon. Second, to the extent that the review indicates that changes are warranted, the statutory modification to streamlining contemplated in the draft legislation would be more rigid than regulatory changes, and could not be readily amended in light of new developments and information. As a result, such statutory modifications should be opposed.

III. THE DEPARTMENT SUPPORTS TWO ADDITIONAL PROPOSALS THAT WOULD HELP STEM THE TIDE OF IMMIGRATION LITIGATION.

Finally, there are two additional ways to alleviate the crushing immigration litigation burden on the Department and the Courts, both of which have been adopted by the House of Representatives. First, the Department supports modifying section

nonetheless held that it has jurisdiction over discretionary questions, except when the discretion is "pure" and unguided by legal standards or guidelines. *See Oropeza-Wong v. Gonzales*, 406 F.3d 1135 (9th Cir. 2005). Accordingly, when the Department acts responsibly and adopts guidelines for its adjudicators in order to promote uniformity, the Ninth Circuit asserts jurisdiction, further burdening Department litigators. Understandably, two other courts have rejected the Ninth Circuit's interpretation. *See Assaad v. Ashcroft*, 378 F.3d 471, 475 (5th Cir.2004); *Urena-Tavarez v. Ashcroft*, 367 F.3d 154, 161 (3d Cir.2004).

Second, the Department endorses clarifying the scope of section 242(a)(2)(C) of the INA, which limits judicial review over factual determinations regarding criminal aliens. Attempting to expedite the removal of such aliens, Congress adopted this provision in 1996. The Ninth Circuit, however, has carved out an exception for certain criminal aliens seeking relief from removal—in plain contradiction to the terms of the statute. *See Unuakhaulu v. Ashcroft*, 398 F.3d 1085, 1089 (9th Cir. 2004). The amendments proposed by the Administration would fix both of these problems.

IV. CONCLUSION.

The Department of Justice thanks the Committee once again for the opportunity to express its views on the proposed legislation and stands ready to gather and provide further information on these issues at the Committee's request.

The Federal Circuit Bar Association
BENCH & BAR

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March 24, 2006

The Honorable Bill Frist
Senate Majority Leader
United States Senate
509 Hart Senate Office
Washington, DC 20510-7010

The Honorable Arlen Specter
Chairman, Senate Judiciary Committee
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510-6275

Re: Provisions of Pending Immigration Reform Bills Transferring Jurisdiction Over Immigration Appeals to the U.S. Court of Appeals for the Federal Circuit

Dear Majority Leader Frist and Chairman Specter:

The Board of Governors of the Federal Circuit Bar Association (FCBA) seeks your reconsideration of certain provisions in the pending immigration reform legislation, specifically, those that would transfer jurisdiction over immigration appeals to the U.S. Court of Appeals for the Federal Circuit (Federal Circuit). Our membership, and their clients, daily witness the Circuit's exhaustive commitment to the administration of justice in the country's most complex national interest litigation. With the burdens of the existing tasks firmly in our minds, we would respectfully urge the prompt deletion of the Circuit jurisdiction provisions. At the least, no transfer of jurisdiction to the Circuit should occur without specific provisions enabling the Federal Circuit to handle the new cases if the currently drafted legislation passes. Failure to do so would create insurmountable logistical challenges and doom the underlying goals of the transfer from the outset. We would be glad to discuss and work with you and your staffs to address these matters.

The FCBA is a national organization comprising approximately 2600 attorneys who practice not only before the United States Court of Appeals for the Federal Circuit but also in the many district courts, other courts, boards, and agencies which the Circuit reviews. The organization's perspective includes all of the Circuit's legal community and its most respected practitioners as well. We place a critical emphasis on speaking for the best interests of the administration of justice in this community and to that extent encourage an active dialogue, not only among practitioners but also between the members of the various courts and the bar. Our perspective is meant to be neutral and objective, not favoring one constituency over the other.

With regard to the pending immigration legislation, our focus is solely on the proposed shift in appellate jurisdiction. We take no position on other specific elements of the bills or on the important underlying need for immigration reform. Moreover, we are confident that successful immigration reform can be achieved without drastically changing the Federal Circuit's jurisdiction and abandoning both the expertise and the infrastructure extant in the regional Courts of Appeals.

Removing immigration appeals from the general jurisdiction of the twelve regional Courts of Appeals and centralizing it in the Federal Circuit has enormous implications for the existing jurisdictional allocations and the related administration of justice infrastructure. Recognizing that, our particular focus today is on the implications for the Federal Circuit's role. It is simply not equipped to undertake the more than 12,000 requests for review of deportation orders that twelve courts of appeal now share each year. It is inevitable that the proposed legislation would have a dramatic, negative impact on the processing of Federal Circuit appeals in all of its various jurisdictional areas.

Those areas include matters of great national significance, critical to the country's domestic economy and its international position. Whether one speaks of intellectual property, government contracts, international trade, government personnel, veterans' claims, tax refunds, or other ancillary matters, Congress has tasked the Federal Circuit to administer the judicial system in a way which brings uniformity and predictability. Each of these areas individually and all of them collectively create a docket of unique complexity and fact-intensity. For example, the increased caseload would necessarily delay decisions, which in turn would cause uncertainty over party rights. The result is that the dedicated judges of the Federal Circuit, while producing excellent and respected jurisprudence, would be required to move at an even more intense monthly pace — handlling hundreds of new immigration appeals while simultaneously preparing for oral arguments, hearing arguments, consulting among themselves, and drafting and issuing opinions. There is no perceived down time and certainly no elasticity to absorb the burden the current language portends.

The facts available to us indicate that, in 2005, there were 11,464 immigration appeals in the U.S. Courts of Appeals. In contrast, the total number of cases (filed and pending) in 2004 heard by the Federal Circuit was 1,662. Immigration appeals are typically brought by immigrants who are pro se and tend to require significant court and staff resources to adjudicate. Indeed, the U. S. Court of Appeals for the Second Circuit alone handled about one-third (4,519) of the immigration cases in the year ending September 2004. To do so, it currently maintains a staff of eight full time attorneys devoted solely to immigration appeals and a staff of 23 other attorneys who spend roughly a quarter of their time on immigration appeals. Although a forthright proposal, the current draft's addition of three new judges to the Federal Circuit stands in the face of a Circuit which is already fully consumed in meeting its obligations and could well warrant new judges in that respect alone. The current draft, however, makes no provision for additional staff, facilities, or funding. Moreover, it renders certain illegal aliens criminals, which may give these cases priority over the Federal Circuit's existing civil cases and delay justice for the many parties (including the government) within the Federal Circuit's existing jurisdiction.

In view of these facts, we urge you to remove the provisions in the pending immigration reform bills that would transfer jurisdiction over immigration appeals to the Federal Circuit. Alternatively, we urge you to include specific provisions (following careful investigation) that would allocate to the Federal Circuit the necessary resources for the Federal Circuit to accept successfully the seven-fold increase in its workload entailed by the transfer.

Thank you for your attention to this matter, which is of vital concern to the Board of the FCBA and its members.

Sincerely,

Kevin R. Casey

Kevin R. Casey
President-Elect

human rights *first*

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Chairman Arlen Specter
711 Hart Senate Office Building
Washington, DC 20510

March 16, 2006

Dear Chairman Specter:

As operators of one of the nation's largest *pro bono* legal representation programs for refugees seeking asylum, we write to alert you to provisions in the Comprehensive Immigration Reform Act ("CIRA") of 2006 that we believe will endanger victims of religious and political persecution who seek safety in this country.

Based on our more than 25 years experience providing free legal representation to refugees seeking protection, we know the vital importance of appropriate judicial oversight and review in life-and-death asylum decisions. That is why we are so concerned with Sections 701 and 707 of the Judiciary Committee's current Chairman's Mark, which would limit judicial review of decisions affecting asylum seekers.

These provisions would place jurisdiction over all asylum and immigration cases nationwide in the hands of the U.S. Court of Appeals for the Federal Circuit – a court with no institutional experience in either asylum or immigration law – and would require dismissal of these cases unless a single judge takes affirmative action within a set period to let the case go forward. These proposals would make it vastly harder for asylum seekers far from Washington, D.C. to find lawyers to represent them, and would set the stage for incorrect dismissals of asylum appeals.

Our own clients include refugees who, without the availability of federal court review to remedy incorrect asylum denials, would have been deported to their deaths. We know that recent procedural changes at the Board of Immigration Appeals have increased the burden on federal courts in immigration cases. But the solution cannot lie in simply denying justice to refugees whose lives and safety are in our hands. We urge you to reject these provisions that would deny asylum seekers access to a viable process of judicial review.

In addition to the provisions limiting judicial review, we are deeply concerned about the following provisions in Title II of the Chairman's Mark, addressed last week:

- **Section 206** – Criminalizes asylum seekers who fall out of status while they wade through the complex asylum process and prepare their applications; and

- **Section 202** – Provides statutory authority for prolonged detention of asylum seekers during appeal to federal courts, and for the indefinite detention of immigrants and failed asylum seekers whose countries will not accept deportation.

As they flee for their lives, refugees at times have no choice but to resort to false documents to ensure that they can escape to safety. Indeed, the U.S. has long honored Raoul Wallenberg as a hero for providing Jewish refugees with false passports so that they could flee from Nazi persecution, and the 1951 Refugee Convention itself prohibits states from penalizing refugees for their illegal entry. Although the Committee passed an amendment offered by Senator Feinstein that would amend Section 208 to exempt certain refugees and asylees from prosecution under select sections of Chapter 75, Title 18 of the U.S. Code, we remain concerned that the "carve out" language does not cover certain classes of asylum seekers. When Senator Feinstein works with Senator Kyl and other members on this amendment, we recommend an exception that is free of arbitrary time limits for asylum seekers and other vulnerable populations.

If enacted, the provisions listed above would constitute an abdication of this country's historic moral and legal obligation towards those who flee persecution and seek a safe haven here. We urge you to reject them.

U.S. leadership in protecting refugees, including those who seek asylum, has never been more important. Many governments are watching what the United States does on this issue, and will follow our lead. We believe that comprehensive reform can be achieved without forfeiting U.S. values and commitment to refugees. We urge you to ensure that the final bill reflects those values and that commitment.

Sincerely,

Maureen Byrnes

Maureen Byrnes
Executive Director

Intellectual Property Owners Association

March 23, 2006

The Honorable Bill Frist
Senate Majority Leader
United States Senate
S-230 Capitol Building
Washington, DC 20510-7010

The Honorable Arlen Specter
Chairman, Senate Judiciary Committee
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510-6275

Dear Majority Leader Frist and Chairman Specter:

RE: Our Opposition to Transferring Jurisdiction Over Immigration Appeals to the Court of Appeals for the Federal Circuit

Intellectual Property Owners Association (IPO) strongly opposes the provisions in the pending immigration reform bills that would transfer jurisdiction over immigration appeals to the U.S. Court of Appeals for the Federal Circuit. Transferring immigration jurisdiction to the Federal Circuit would seriously hinder the court's ability to render high quality, timely decisions on intellectual property cases at a time when Congress has been actively looking at ways to reform the patent system that is so vital to America's competitiveness and economic well being.

IPO is a trade association representing companies and individuals in all industries and fields of technology who own or are interested in intellectual property rights. IPO's membership includes more than 200 companies and a total of 7,700 individuals who are involved in the association through their companies or as inventor, author, executive, law firm or attorney members.

We take no position on other issues in the legislation. Indeed, many of our member companies consider immigration reform to be critically important. We are confident, however, that successful immigration reform can be achieved without changing the Federal Circuit's jurisdiction. At the very least, we strongly believe that a change to the judiciary as significant and potentially disruptive to our nation's intellectual property system should not be done hastily, and certainly not without public hearings in which the views of some of this country's most productive companies and individuals - who own patents, trademarks, copyrights and trade secrets - can be heard on the matter.

As you know, the Court of Appeals for the Federal Circuit was created in 1982 after careful study and public consideration. Before 1982, patent appeals were handled by the regional federal courts of appeals, and patent law was notorious for its lack of uniformity. The creation of a specialized court to consider patent cases was studied by a commission chaired by the late Senator Roman Hruska. Extensive Congressional hearings were held. Congress decided that creating a semi-specialized appellate court was the solution to the unique problems associated with patent decisions. The court succeeded the Court of Customs and Patent Appeals, which already had jurisdiction over appeals from the Patent Office, and the Court of Claims. Over the past 24 years the Federal Circuit has made great progress in handling intellectual property cases.

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Still today, given the complexity of the cases, the Federal Circuit sometimes struggles in the quest to achieve and maintain consistency in its patent decisions. We are therefore particularly concerned that with the addition of thousands of appeals in immigration cases the Federal Circuit would be utterly unable to cope with its intellectual property docket. The resulting delay in deciding patent cases would exacerbate the current uncertainty over patent rights and would cause undue interference with business investments in technological innovation.

In fact, it is because of the current weaknesses of the patent system that Congress has been exploring appropriate and reasonable steps towards patent reform, following the studies conducted by the Federal Trade Commission and the National Academy of Sciences. We very much appreciate the hearings that the Senate Judiciary Committee held last year on patent law reform and harmonization. As you know, the House is considering legislation to overhaul the patent statute, and we understand patent reform legislation may be introduced in the Senate soon. It would be extremely unfortunate for Congress, in the context of immigration reform, to compound the patent system's current problems by weakening the ability of the Federal Circuit to decide patent cases.

For all of these reasons, we urge you to remove the provisions in the pending immigration reform bills that would transfer jurisdiction over immigration appeals to the U.S. Court of Appeals for the Federal Circuit.

We appreciate your attention to this matter that is of vital concern to our members.

Sincerely,

Marc S. Adler
President

Cc: Members of the Senate Judiciary Committee

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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U.S. Circuit Judge

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March 30, 2006

The Honorable Arlen Specter
Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C 20510

Dear Mr. Chairman:

Please accept my sincere apologies for being unable to appear at the hearing scheduled for this Monday, April 3, 2006. Fortunately, however, my colleague Carlos Bea will be able to appear, and, having reviewed an advance copy of Judge Bea's statement, I can say that Judge Bea fairly represents my view as well.

Like Judge Bea, I am a product of our immigration system. My parents and I were refugees from Communism, and were paroled into this country in 1962. During the course of the next several years we had frequent contacts with immigration authorities, culminating in our admission to citizenship on December 20, 1968--which I still count as one of the proudest days of my life. Based on my personal experiences, as well as 20 years of reviewing immigration cases in the court of appeals, I have found immigration agents to be hard-working public servants who go to great pains to administer the immigration laws fairly. Nevertheless, people make mistakes, and an effective system of administrative and judicial review of immigration decisions--culminating in an Article III tribunal--is essential to ensure fair application of the immigration laws.

I do agree with Judge Bea that judicial review of immigration decisions may be improved if it were consolidated into a single national tribunal--such as the Federal Circuit--in lieu of the current system where appeals are taken to the regional circuits. As the Committee is well aware, immigration cases are not uniformly distributed among the circuits; some circuits have a far greater proportion than others. Also, many important details in the law applicable to immigration cases are not uniform nation-wide. Rather, there are significant

differences in the law of the various circuits, and this creates an unfairness to both the government and immigration petitioner, because the outcome of many cases may well be different depending on which regional circuit happens to hear the case. These variations also lead to a certain degree of forum shopping as immigration petitioners who are represented by savvy lawyers can choose in which circuit to file their petitions. Uncertainty in the application of the law also invites appeals because the uncertain outcome may give petitioners a false sense of the likelihood of success.

I express no view as to whether immigration appeals ought to be consolidated in the Federal Circuit or some other tribunal. I would note, however, that the experiment of consolidating patent cases in the Federal Circuit has proven a resounding success--to the great benefit of patent holders and licensees. Also, having once served as Chief Judge of the United States Claims Court (now the Court of Federal Claims), I have actually had the experience of having my decisions reviewed by the Federal Circuit. I found the Federal Circuit to be swift, fair and judicious in its handling of the appeals. The court, in my experience, struck just the right balance between giving deference to the trial judge and exercising independent review authority. I believe that moderate approach to the process of judicial review would have a salutary effect on the administration of the immigration laws.

Again, please accept my apologies for being unable to appear in person. I hope my comments will, nonetheless, be of use to the Committee.

Sincerely,

Alex Kozinski

AK/dms

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March 21, 2006

Via Electronic Mail

United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Members of the Committee on the Judiciary:

We are law professors and scholars who teach and study in the area of immigration law. We are following with great interest the efforts of the Judiciary Committee to draft an immigration reform bill. Many organizations and other legal scholars have written to object to the judicial review-limiting provisions of the Chairman's Mark of the "Comprehensive Immigration Reform Act of 2006." We write because we share the serious reservations of our colleagues and urge that these far-reaching provisions be withdrawn pending further study of their effect and desirability.

Among other changes, the Chairman's Mark proposes to place exclusive jurisdiction over immigration appeals in the Court of Appeals for the Federal Circuit, a specialized court that currently hears cases in areas distant from immigration law. The Chairman's Mark also establishes a system of default denials of petitions for review by a single judge, and would eliminate judicial review altogether in various other immigration matters.

We are aware of no studies or public discourse evaluating these untested measures or explaining how they would effectively address problems with the current system, or even what those problems might be. Nor has there been any explanation of how a minimally expanded Federal Circuit will provide meaningful review of a caseload many times the size of its current docket. In view of the liberty interests at stake, measures fundamentally reshaping and limiting judicial review of immigration decisions should not be lightly adopted—and certainly not without thoughtful study of the problems these measures purport to address. Such an unconsidered restriction of judicial oversight would be particularly inappropriate in light of the Attorney General's ongoing review of agency decision-making. This review was largely prompted by federal court decisions finding malfeasance by the immigration agencies, highlighting the critical role of judicial review in maintaining the system's integrity.

The judicial review provisions in the Chairman's Mark represent a fundamental restructuring of the current system and should not be undertaken without further study. Accordingly, we suggest that Section 701, Section 707, and any provisions restricting judicial review be withdrawn from the Chairman's Mark. We appreciate the opportunity to provide these brief comments.

Respectfully,

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March 14, 2006

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

We are law school deans and legal scholars whose areas of scholarship include federal courts, administrative law, immigration law, and constitutional law. We write to express our profound reservations regarding the legislative proposal found in Section 701 of your draft bill entitled February 24, 2006, Chairman's Mark. This provision would place exclusive jurisdiction over all future immigration appeals in the U.S. Court of Appeals for the Federal Circuit and eliminate the role of the regional courts of appeals in such appeals. We urge that this proposal be withdrawn immediately, so that it can be subjected to the careful study that such a fundamental change in our legal order warrants

Our concerns are based on: the strong, historically grounded presumption favoring the use of Article III appellate courts of general jurisdiction in our judicial system; the important values underlying that tradition; and the often unforeseen negative consequences that arise when specialized courts are established (and especially when they are established hastily, as this bill would do).

We are, unsurprisingly, not of one view regarding the costs and benefits of specialized courts. But we strongly share the view that transferring categories of cases involving claims of personal liberty that are currently heard in the regional circuits to a single, narrowly focused, specialized, commercially oriented court should not be done precipitously, or without hearings in which experts on immigration, federal jurisdiction, constitutional law, and administrative procedure can be heard. We are fully mindful of the caseload pressures that some circuits are presently facing, due in no small part to the upsurge in immigration appeals. Nonetheless, we do not believe that the current situation warrants the radical step of relegating all immigration appeals to the Federal Circuit, a court of specialized jurisdiction that currently hears cases involving areas quite distant from immigration law, such as patents and trademarks, veterans' claims, and other miscellaneous matters.

Legal scholars have in the past raised reservations about specialized courts on numerous grounds. Generalist judges have the benefit of applying their broad judgment and experience drawn from deciding cases across many and varied fields of law, while specialist judges are exposed solely or mostly to a single narrow field of law. This can generate not only tunnel vision but also an ossification of views in such judges. Moreover, specialized courts are considerably more prone than generalist courts to being "captured" by opposing interest groups or the agency they review. These are dangers that should not be lightly undertaken when liberty is at stake.

In immigration cases, for example, judges are typically asked to interpret the federal immigration statute, as well as complex and interrelated questions of constitutional law, criminal law, habeas corpus, state criminal statutes, family law and individual liberty. The specialized judges of the Federal Circuit rarely, if ever, now confront any of these types of claims. Thus, their consideration of these multifaceted and important issues would arise overwhelmingly, if not exclusively, in the immigration context. The Federal Circuit judges would not benefit from the broader experience of considering similar questions in a wide variety of contexts and cases that has been one of the hallmarks and strengths of the generalist tradition of Article III judging.

In addition, as a practical matter, the Federal Circuit would face an initial caseload crisis and many novel transitional practical and legal issues, as it confronts the large number of new immigration appeals from throughout the country. This caseload increase could dilute the quality of the Federal Circuit's decision-making not only in the immigration cases that would be added to its docket, but also in the areas of its existing jurisdiction. Some of those transitional issues may diminish over time. Specialized courts are, however, far more vulnerable to fluctuations in caseload because of their limited jurisdiction. These kinds of fluctuations can be even more extreme with immigration cases, due to such factors as changes in patterns of immigration enforcement and the impact of federal legislation.

Significant issues of fairness and the perception of access to the courts would also be raised if henceforth, all immigration cases were heard exclusively in the Federal Circuit. Immigrant petitioners, unlike commercial litigants, are often not represented by legal counsel and may be incarcerated during the pendency of any appeal.

We believe, therefore, that altering the appellate jurisdiction of the regional federal courts to centralize claims in a single specialized court ought to be, if anything, a response of last resort. This option should be pursued only after the Judiciary Committees of Congress hold hearings at which experts are called and thorough study is made. Such a hearing would permit a thorough consideration of the costs and benefits of the specific proposal, as well as consideration of the experience with previous or current specialized courts.

For all the foregoing reasons, we urge you to delete 701 from the Chairman's Mark of the immigration legislation, and to consider that proposal, if at all, at a time and in legislation where the broader implications and various considerations raised by this proposal can be fully expressed and evaluated before enactment.

We note that the proposal in section 707 of the Chairman's Mark to create a new certificate-of-reviewability gatekeeper system for immigration appeals is also untested in relation to executive detention, and it raises constitutionally-sensitive questions of access to judicial review that would benefit from further study by your Committee. By expressing our opposition to 701 we do not mean to suggest any endorsement of section

707 or any other provision of the proposed bill, about which we express no collective view.

If further information regarding our views would be helpful, Harold Hongju Koh would be pleased to speak or meet with you.

Respectfully,

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cc: Members of the Committee on the Judiciary

U.S. SENATOR PATRICK LEAHY

CONTACT: David Carle, 202-224-3693 VERMONT

Statement of Senator Patrick Leahy
Ranking Member, Judiciary Committee
Hearing on Immigration Reform
April 3, 2006

The Chairman's mark on comprehensive immigration reform contained provisions that would radically restructure our system of immigration appeals. Most significant among these was a proposal in section 701 to consolidate all Federal immigration appeals in the Court of Appeals for the Federal Circuit, a highly specialized court that hears appeals on cases involving patents, personnel, and veterans' benefits. Another provision, section 707, would create a one-judge review certification process. This provision could potentially deprive an alien of a review of his case on the merits by the traditional three-judge panel we use in our Federal appellate courts.

The Title VII provisions of the Chairman's mark that the Committee is considering today have generated a great deal of controversy. Several Federal judges, including the Chief Judges on the circuits most affected by immigration appeals, the Ninth and Second Circuits, wrote in opposition these sections. Judge Posner of the Seventh Circuit expressed serious concerns. Even the Chief Judge of the Federal Circuit, while not taking a position on the consolidation proposal, described the sweeping overhaul of his court that would be required to take on the immigration appeals cases, including vast increases in staff, resources, and space.

Last week, as the Committee was finishing its markup of the immigration bill, the Chairman said that he would set aside Title VII in order to study its proposals more carefully. The bill was reported to the full Senate without this title, and the Chairman scheduled today's hearing to examine the issues. I commend the Chairman for adopting this more sensible approach.

There is a significant backlog of pending immigration appeals, with the largest number of cases waiting review in the Ninth and Second Circuits. I agree that this problem must be addressed. It is clear that the backlog has the potential to impair the quality of justice that appellants deserve, and that the United States is obligated to afford. This deficiency has been noted in published judicial decisions and every judge that wrote to the Committee on Title VII discussed this pressing concern.

Before we consider a radical restructuring of the appeals system, however, we must investigate how this problem arose. The Department of Justice claims that the rise in appeals can be traced directly to stepped up enforcement efforts. A more realistic

explanation in my view is that these appeals can be traced to administrative policies put into place by former Attorney General John Ashcroft and the Bush-Cheney Administration.

In 2002, in a purported attempt to "streamline" procedures, Attorney General Ashcroft significantly modified the structure and review processes of the Board of Immigration Appeals (BIA). First and foremost, Attorney General Ashcroft cut the number of judges on the Board from 21 to 11. He disposed of more cases at the BIA with fewer judges by increasing the number of cases referred for single-member summary review, eliminating *de novo* review of the immigration judge's factual findings, and broadening the grounds by which a case could be dismissed.

Attorney General Ashcroft's recipe was to use fewer judges to afford petitioners even less meaningful review. So, while the backlog was reduced at the BIA, the changes had serious consequences throughout the system, resulting in an increased burden on the Federal judiciary and potential harm to immigrant petitioners. The BIA backlog reduction was illusory in that the costs were shifted to the Federal circuit courts of appeals. Between 2001 and 2003 immigration appeals rose from 3 percent to 15 percent of the total caseload of the various circuit courts of appeals.

Before any serious consideration is given to the proposed consolidation of appeals in the Federal Circuit, we must consider what was recommended by each of the judges that wrote to us about this problem. We must reform and improve the system, beginning at the first level of review before immigration judges. We must increase the resources to allow the immigration judges and the BIA to provide meaningful hearings and review. We must address the root of the problem, and not just the symptoms leading to an overburdened system. Attorney General Gonzales announced a review of the immigration court system in January. His study will encompass the quality of work as well as the manner in which it is performed, encompassing the immigration courts and the BIA. We should not revamp our immigration appeals system without first considering the results of that study.

In addition, we must take note of the efforts already under way by the circuit courts of appeals. As Judge Newman describes in his written testimony, the Second Circuit has already taken steps to address its backlog and is making progress. He believes the backlog in that circuit can be curtailed in two to three years. We must contrast that prediction with the forecast of Chief Judge Michel of the Federal Circuit, who writes in his own testimony that it would take up to two years and significant resources to consolidate immigration appeals in the court he leads.

In addition to the concerns raised by the proposed consolidation of appeals in section 701 of the mark, section 707 generated equally strong opposition by the Federal judges, legal scholars, and others that wrote to us. These experts expressed skepticism about the proposed procedure by which one judge, acting as a gatekeeper, can accept or deny, a petition seeking review of a decision. Many of these petitions are, of course, appeals from one-line "affirmance without opinion" from the BIA. The Chairman's mark

contemplates that a single judge, rather than a three-judge panel, should determine the petitioner's fate. In a system where this appeal is likely the last stop for an immigrant who may face danger upon deportation to her home country, a single judge gatekeeper does not amount to meaningful review.

Our witnesses will address these concerns in detail. I welcome each of them, and want to add a personal note of thanks to Judge Walker and Judge Newman of the Second Circuit for appearing today. Judge Mary Schroeder, the Chief Judge of the Ninth Circuit, regrets that she is unable to appear because of court duties this morning. Judge John T. Noonan of the Ninth Circuit was unable to be here in person, but offered to appear by video conference prior to attending to his court responsibilities this morning in California. Regrettably, he was denied this opportunity, although this Committee has seen a number of witnesses invited by the majority testify by video conference. Judge Noonan wrote to the Committee in opposition to sections 701 and 707, and I believe his testimony would have added significantly to this debate. I ask unanimous consent that his letter, Judge Schroeder's letter, and the letters submitted by a number of judges, the Judicial Conference, law school deans, and others be placed in the record.

As we consider any proposed changes to judicial review, we must not lose sight of the profound impact that final immigration decisions have on real people, many of whom have come to the United States seeking sanctuary from persecution, the liberty our Constitution provides, and the opportunity offered by our democratic system. Our judicial treatment of immigrants is a direct reflection of our collective capacity for compassion and humanity in the administration of justice and fulfillment of our laws. Our procedures should respect our history as a nation of immigrants, founded by immigrants who sought to bring to life the designs of true liberty and freedom. To permit our judicial treatment of immigrants to become antithetical to our basic constitutional foundation of due process is to forget our history and disregard American values.

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March 22, 2006

The Honorable Patrick Leahy
Senate Judiciary Committee
433 Russell Building
Washington, DC 20510

Re: Comprehensive Immigration Reform Act of 2006

Dear Senator Leahy,

We are legal scholars in Pennsylvania whose areas of scholarship include immigration law, human rights law, and international law. We write to express our profound reservations regarding several of the legislative proposals contained in the Comprehensive Immigration Reform Act of 2006. Most of the provisions we have noted violate international law and will likely result in the denial of protection to persons fleeing persecution. We have addressed each section of concern below.

1. Sections 206, 208 and 221: Bars to Asylum Eligibility and Enhanced Criminal Penalties for Unlawful Entry/Reentry/Presence. Sections 206, 208 and 221 of the draft bill would establish or increase criminal penalties for unlawful presence and illegal entry or re-entry into the United States and render these crimes aggravated felonies in certain instances. Under U.S. law, persons who have been convicted of an aggravated felony are ineligible for asylum and, in some instances, withholding of removal. Refugees and asylum-seekers at times must resort to the use of fraudulent documents as the only means to escape a threat to their life or freedom. Article 31(1) of the 1951 Convention provides that Contracting States shall not impose penalties on refugees for their illegal entry or presence provided they meet certain criteria. Given the circumstances surrounding refugee flight, criminalizing unlawful presence and entry without providing an exception for these refugees would not be consistent with Article 31(1). **We recommend that the draft bill amend Title 75 of Title 18 of the U.S. Code to include an exception from prosecution for asylum-seekers unless and until their asylum application has been finally denied.**

2. Section 203: Bars to Asylum and/or Withholding of Removal for Minor Offenses. Section 203 of the draft bill would amend INA § 101(a)(43) to include as aggravated felonies preparatory offenses such as soliciting or counseling any of the offenses already included in that section. Section 203, accordingly, would further expand automatic bars to eligibility for asylum and/or withholding of removal. Pursuant to Article 33(2) of the 1951 Convention relating to the Status of Refugees, individuals should be excluded from protection for a criminal offense only after an individualized inquiry into their activities indicates that they have committed a "particularly serious crime" which when weighed against the risk of persecution renders them ineligible for refugee protection. Further expansion of automatic criminal bars to asylum and withholding of removal would increase the risk that legitimate refugees will be subject to *refoulement.* **We recommend that § 203 not be included in the draft bill.**

3. Section 202(a)(1)(D): Detention during Court Proceedings. Section 202(a)(1)(D) of the draft bill would allow the Attorney General to use his discretion to detain individuals who have been granted a stay of their removal order in order to pursue federal appellate relief or a reopening or reconsideration of their case. Section 236 of the Immigration and Nationality Act already grants the Attorney General authority to detain any noncitizen in removal proceedings. The proposed provision does not include a process for an individualized inquiry by an independent adjudicator of the need for the noncitizen's detention. **We recommend that § 202(a)(1)(D) not be included in the draft bill.**

4. Section 202(a)(1)(K)(9): Indefinite Detention. Section 202(a)(1)(K)(9) of the draft bill would allow for the possibility of indefinite detention after a final order of removal and would provide for judicial review only by *habeas corpus* proceedings in the U.S. District Court for the District of Columbia. We are concerned that this provision would impact persons in need of international protection[1] and could lead to arbitrary detention contrary to international law. Indefinite detention, by its nature, may be considered arbitrary. In addition, detention is considered arbitrary when individuals are detained without an adequate analysis of their individual circumstances by an independent body. Many asylum-seekers in the U.S. are indigent, lack legal assistance and are detained in locations far from the District of Columbia, making it difficult for them adequately to represent their liberty interests in the district court located there. **We recommend that § 202 (a)(1)(K)(9) not be included in the draft bill.**

5. Section 203(b): Adjustment of Status. Section 203(b) of the draft bill would remove the ability of refugees or asylees who have been convicted of an aggravated felony to seek a discretionary waiver of their offense in order to adjust their status to that of a lawful permanent resident. Given that the U.S. definition of aggravated felonies is extremely broad, this provision appears to be inconsistent with U.S. obligations under

[1] Persons of concern would include refugees granted withholding of removal who are not otherwise excludable under the 1951 Convention and its 1967 Protocol; those denied asylum and withholding of removal under U.S. law for reasons inconsistent with international standards, such as those subject to automatic bars; and stateless persons.

Article 34 of the 1951 Convention to facilitate "as far as possible" the assimilation and naturalization of refugees. **We recommend that § 203(b) not be included in the draft bill.**

6. Section 705: Reinstatement of Removal Order. Section 705 of the draft bill would provide that individuals who have re-entered the U.S. after a prior removal or voluntary departure be removed without access to any immigration court proceedings. The provision appears to be in conflict with existing regulations which allow individuals who have established "a reasonable fear of persecution or torture" to apply for withholding of removal or UN Convention Against Torture protection before the immigration courts. If the bill precludes consideration of such claims, it could lead to *refoulement* of legitimate refugees in contravention of Article 33(2) of the 1951 Convention relating to the Status of Refugees. **We recommend that § 705 of the draft bill incorporate the provisions in 8 C.F.R. § 241.8(e) that allow access to immigration court proceedings for those individuals who are subject to reinstatement of removal but have established a "reasonable fear" of persecution or torture.**

7. Sections 212(c)(1) and 708(b): Motions to Reopen. Section 212(c)(1) of the draft bill would impose certain time limits on the filing of motions to reopen removal orders. The section appears to conflict with current INA § 240(c)(7)(ii) which allows for motions to reopen for asylum based on changed country conditions to be exempted from time limits. **In order to ensure that motions based on changed country conditions continue to be allowed, we recommend that the word "timely" in the first line of § 212(c)(1) of the draft bill be stricken and that the reference in § 212(c)(1) to § 240(c)(6) be changed to § 240(c)(7).**

Section 708(b) of the draft bill would allow individuals to file motions to reopen within 30 days of notice that DHS plans to remove them to an alternative country only if the individual establishes entitlement to withholding of removal or protection under the U.N. Convention Against Torture. An individual should have the opportunity to also apply for asylum in these instances. If during immigration court proceedings, DHS had indicated its intention to remove the individual to an alternative country, the individual would have the opportunity to seek asylum. Simply because the notice to do so is given after immigration court proceedings should not preclude the ability to file a claim for asylum. **We recommend that § 708(b)(v)(III) include provisions also allowing for reopening in order to apply for asylum under INA § 208 upon notice of DHS' intent to remove an individual to an alternative country.**

8. Section 706: Central Reason Requirement. Section 706 would require withholding of removal applicants to establish that one of the five protected grounds in the refugee definition (race, religion, nationality, membership in a particular social group, or political opinion) would be at least one central reason for the threat to their life or freedom. The law as it now stands requires asylum seekers to prove that their persecutor

persecuted them on account of one of the five grounds for asylum. The law also requires that asylum seekers prove that they possess a belief or characteristic that the persecutor seeks to overcome through punishment; that the persecutor be aware or able to become aware of the characteristic; that the persecutor have the capability to persecute the asylum seeker; and that the persecutor have the inclination to persecute the asylum seeker. *See Matter of Mogharrabi*, 19 I & N Dec. 489 (BIA 1987). The provision contained in this section of the bill is vague, unnecessary, vulnerable to abuse and misapplication by adjudicators, and contrary to the guidance contained in the U.N. Handbook, which states the following:

> Often the applicant [him or herself] may not be aware of the reasons for the persecution feared. It is not, however, his [or her] duty to analyse [sic] his [or her] case to such an extent as to identify the reasons in detail.

We recommend that § 706 not be included in the draft bill.

9. Section 715: Legal Orientation Program. We fully support section 715 of the draft bill which would authorize nationwide expansion of the legal orientation program and its continuing implementation by the Executive Office for Immigration Review. This program is often the only mechanism for providing legal information to asylum-seekers who are detained. **We recommend that § 715 remain in the bill.**

Respectfully,

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Judicial and Administrative Review of Immigration Decisions
Testimony before the Senate Committee on the Judiciary
April 3, 2006

David A. Martin
Warner-Booker Distinguished Professor of International Law
University of Virginia

Mr. Chairman and Members of the Committee: I appreciate the invitation to appear before you today to address important issues of judicial and administrative review that have arisen in connection with the immigration reform proposals now pending before Congress. I have taught and written about immigration and constitutional law for 25 years. I also spent two and a half years as General Counsel of the Immigration and Naturalization Service in the mid-1990s, an experience that afforded me close inside acquaintance with how review affects the operations of the agencies charged with administering and enforcing the immigration laws.

It is quite true that the current system for administrative and judicial review of immigration decisions is under stress. The greatly increased volume of immigration appeals in the federal courts has imposed difficulties on the courts and their staff, the Department of Justice, and the private bar. The Committee is right to be concerned about these issues. But it would be profoundly unwise, in my opinion, to consolidate all judicial appeals in the Federal Circuit, as was proposed in section 701 of the Chairman's initial bill before the Committee. The nation – and indeed the agencies involved in immigration matters – benefit significantly from the involvement of the generalist regional courts of appeals in the consideration of immigration issues. And those courts have been finding ways to adapt to the new caseload. Their efforts should be allowed time to mature. Also, I believe that the single-judge screening mechanism provided by section 707 of the Chairman's mark would risk denying court consideration in cases where careful review should be provided. It might also prove counterproductive, ultimately creating more work for the courts involved. The remedy for the current problems should focus instead on restoring sound functioning by the Board of Immigration Appeals. This requires both additional resources and the return, in essence, to a system of administrative appellate review that pertained before a set of changes was imposed in the 2002 streamlining regulations, with unintended effects that have brought many negative consequences.

I. The Proposed Transfer of Jurisdiction to the Federal Circuit Would be Unsound

The arguments offered by some for transferring jurisdiction over immigration appeals to the Federal Circuit are thin, and cannot begin to overcome the significant

transition costs as detailed by Judge Michel, Chief Judge of the Federal Circuit, in his testimony – to say nothing of other practical disadvantages. Nor do they outweigh the importance of involvement by judges from generalist courts in a caseload that frequently involves questions of individual liberty or the rights afforded by our statutes and treaties for refugees to gain protection from persecution. Generalist courts help counteract the inevitable tendency of specialist agencies to become overly preoccupied with their own missions, narrowly conceived. American administrative law greatly benefits from this balance and counterpoise, and immigration law should not be isolated from these salutary effects. Immigration law can be highly technical, to be sure, but I agree wholly with Judge Newman that most of the cases now reaching the courts of appeals do not present close technical issues. They usually involve factual disputes or controversies over credibility determinations.

The two main arguments for such consolidation are apparently the risk of forum shopping and the need for uniformity and consistency in the administration of the immigration laws. Forum shopping was arguably a problem (though one that presented itself only in a tiny minority of cases) before 1996. Amendments that year, however, eliminated the possibility that an alien could move to another circuit during or after his administrative proceedings in order to take advantage of more advantageous case law. The 1996 legislation added section 242(b)(2) to the Immigration and Nationality Act (INA) to provide that judicial review must be had in the circuit with jurisdiction over the place where the immigration judge issued the initial ruling. The Department of Homeland Security initially determines that venue by filing the charging documents with an immigration court. The regulations afford a limited opportunity to change venue, but change requires an order of an immigration judge, issued for good cause shown.

Consistency and uniformity are of course important values in administrative law, but one can easily exaggerate the extent to which the current immigration system departs from consistency. Most issues of legal interpretation are initially determined by the administering agency, and the vast majority of those then remain undisturbed, assuring a core consistency in operations. When Congress passed the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), it introduced a host of complex new provisions into the INA. I was then at INS, and we developed a careful and systematic process, often involving other components of the Department of Justice or other agencies, to bring interpretive questions to the surface and to consult about the best ways to resolve them. We then built those understandings into the implementing regulations and other guidance. I know that in the overwhelming majority of cases, those interpretations simply became part of the shared understanding, by agencies, the bar and the public, of the new provisions. Most such interpretations were not questioned in court and have provided uniformity in the implementation of the law. A mere handful, compared with the range of issues initially presented, have been challenged in litigation, but principles of administrative deference (including the Supreme Court's *Chevron* doctrine) usually have resulted in judicial acceptance of the authoritative agency interpretation. It is only in a small number of instances that the circuits have split on such questions.

Some such disagreement is wholly understandable, and temporary persistence of differences among the circuits on this small number of issues does not significantly impede the agencies involved. The immigration laws raise important questions that touch on broad considerations of national policy, foreign relations, sound administration of a complex administrative scheme, individual liberties, and our shared national heritage as a country of immigration and refuge. Circuit splits historically serve the purpose of helping to signal when there are ambiguities in the law, significant constitutional issues, or difficulties in reconciling the many policy objectives our immigration laws serve. Ultimate resolution by the Supreme Court of these kinds of difficult questions benefits from the efforts of seasoned judges from different circuits to analyze the issues afresh, and from acquaintance with many different fact patterns, as presented in the various circuit decisions, that may foster the Court's understanding of the full stakes. If all appeals went only to the Federal Circuit, a prematurely uniform resolution of truly difficult questions of statutory interpretation or constitutional application might impede this percolation process, as it is often called. The system usually benefits from circuit splits in the relatively small number of instances where they occur – because deliberation by several courts helps to think through the best way ultimately to resolve the issue.

I say this even though I remember occasional frustration, during my time at INS, with judicial decisions I thought deeply wrong – a frustration often shared by my DOJ colleagues. But consolidation in a single court affords no guarantee against occasional unsound decisions, and I am pleased to see that the DOJ testimony offered here today does not say much in support of the proposal to move all cases to the Federal Circuit. Moreover, the fact of different rules in different circuits on a few questions does not significantly hamper the agencies involved. It has been quite common to issue legal and operational guidance that is circuit-specific – until such time as court decision or statutory change resolves the differences.

It is said by some that the Supreme Court is not equipped adequately to resolve circuit splits on immigration matters. That claim is belied, in my opinion, by the fairly active immigration docket the Supreme Court has maintained – resolving circuit splits in recent years, for example, over questions of habeas corpus review, the retroactivity of certain changes to relief from removal, the application of the "aggravated felony" definition to certain crimes, and the detention provisions of the statute.

More importantly, Supreme Court review is not required in order to restore uniformity on most such differences in the immigration field. Congress has often responded to circuit splits on important statutory questions by amending the underlying provision. The REAL ID Act of 2005, for example, contained important new provisions on credibility determinations and corroboration requirements in asylum cases – precisely one of the circuit splits that is highlighted by some who favor consolidation of immigration cases in a specialized court. Because those new rules apply only with respect to asylum claims filed after May 11, 2005, we have little experience so far with their impact on judicial review. But I expect to see far less in the way of variance among the circuits once the amendments take full effect. Furthermore, other provisions in pending immigration reform legislation, clarifying existing provisions in light of

controversies that have arisen in ongoing litigation, are likely to resolve differences on other key issues. For example, section 705 of the Chairman's mark would amend the reinstatement of removal provision, INA § 241(a)(5), in a way that would end the circuit split on this issue, which is highlighted in the testimony of Judge Bea.

It would be far better to serve the objectives of uniform and consistent administration through strengthening the administrative agencies that make the initial judgments. I speak below of ways to strengthen the BIA and restore its historic role as a primary venue for consistent and uniform rulings on issues of law and fact, one that will consistently inspire the full measure of judicial deference. But uniformity has also been hampered by unintended effects of the split of immigration functions among three separate bureaus of the Department of Homeland Security (DHS) – without, as yet, a truly effective departmental mechanism for timely resolution of differences among those bureaus on difficult questions of law and policy. The Committee could strike a far more effective and important blow for consistency and sound administration by addressing that issue – for example, by consolidating ICE and CBP within DHS, or by placing both those bureaus, plus USCIS, under a single Under Secretary for Immigration Affairs (or Immigration and Customs Affairs).

II. The Proposed Certificate of Reviewability Risks Jeopardizing Important Values and May Not Save Significant Judicial Resources

Section 707 of the Chairman's mark also proposes that appeals could be heard in an article III court only following a grant by a single judge of a certificate of reviewability (COR). The Department of Justice strongly supports this procedure, and analogizes it to the procedure for issuance of a certificate of appealability by a single judge under 28 U.S.C. § 2253. That analogy is deeply flawed, and the proposed procedure should not be adopted. The individuals involved in standard removal cases deserve at least one opportunity for full consideration by Article III judges, although of course it is appropriate to resolve insubstantial appeals through summary measures or other court management practices like those already in place in the courts of appeals. The existing steps taken by the regional circuits are beginning to master the recent jump in immigration filings – as described, for example, in the testimony of Judge Walker and Judge Newman, and in other communications the committee has received. We should at least gain more experience with the full impact of those court management measures before adopting so sharp a departure (as the COR represents) from our historic commitment to court access in cases where individual stakes may be quite high and constitutional claims may be implicated. Moreover, as a practical matter, experience with similar screening measures in other settings suggests that adopting this prior review system might even slow down the resolution of immigration cases.

Section 2253, the allegedly analogous procedure, governs appeals to the courts of appeals of decisions by federal district court judges on habeas corpus petitions filed by persons challenging criminal convictions entered by state or federal courts. Those convictions have already been ruled upon by judges – not solely by administrative adjudicators – and have been subject to a full spectrum of direct judicial review,

including possible access to the U.S. Supreme Court on a petition for certiorari. Section 2253 then governs *collateral review* that becomes applicable, if at all, after multiple layers of direct judicial review. Even there, the petitioner has access to full consideration of the habeas petition by a federal district court judge. The gatekeeper provision (the certificate of appealability) comes into play only after that judge's consideration, and in part it is meant to reflect sensitivity to the important separate status of the states under our federal system of government.

The immigration setting is strikingly different. It presents no federalism issues requiring deference to the courts of the states. Immigration control is clearly a federal function. Moreover, Section 707 covers direct review – the only opportunity for an individual to present his case to an Article III judge, in a field where limitations on judicial access at least raise significant constitutional doubts (as the Supreme Court ruled in *INS v. St. Cyr*). I am sure that the single judges performing the screening would carry it out conscientiously. But there is always a risk of erroneous dismissals of meritorious claims, a risk that can be diminished if there is panel consideration or more complete briefing. This is particularly a risk at present, because, under administrative changes adopted in 2002, the BIA often provides only single word affirmances or brief rulings that do not greatly help the reviewing judge in understanding the record, the issues, or the relevant case law.

Much will turn on the governing standard for granting the COR, as it actually comes to work in daily operation. If that standard is too stringent, the procedure will effectively dispose of potentially important claims based on limited information and without briefing by the government, and may miss significant statutory or constitutional issues. Or if, as is likely, a great many of the appeals present factual issues, the single judge may have to delve deeply into a voluminous record to decide on the certificate – and likely will end up passing such factual questions on to a full panel of three judges. In the latter case, the court will in essence have to plunge into the merits twice. Judge Michel's testimony points out that the Federal Circuit considered a similar procedure for screening Merit Systems Protection Board appeals, but ultimately rejected it because the court concluded that the new procedure might actually require the court to consider most cases twice.

In sum, the screening procedure will achieve judicial economies only if it actually screens out a fairly high percentage of the cases. The proposal is accompanied by no studies, to my knowledge, suggesting that that would be the case. My understanding of the caseload suggests quite the opposite – and some of the judges testifying today, having a far closer acquaintance with the current caseload, bear out this impression. Nonetheless, if stringently administered, the procedure seems likely to prevent meritorious cases involving high stakes and possible constitutional issues from receiving the kind of review they deserve from Article III courts, and that our nation has historically provided. But if the standard is softened to avoid that highly negative result (a later amendment proposed by the Chairman, as I understand it, would move strongly in that salutary direction), then the process is likely to screen out relatively few cases – certainly few that are not currently handled by speedier procedures already implemented

by the circuit courts. It is highly significant that the Executive Committee of the Judicial Conference of the United States met last week and specifically decided to oppose the screening procedure set forth in section 707, in part because of the inadequacy of the administrative record currently being transferred from the BIA. I understand that the March 31 letter from Leonidas Ralph Mecham, secretary of the Judicial Conference, is being entered into the record. That letter explains: "Streamlining both the administrative and appellate review of immigration cases raises concerns about whether the process would provide a meaningful review . . . ."

III. Concentrate on Resource Additions and Reforms for the BIA and Immigration Courts

As that letter indirectly suggests, the current stresses on the system for judicial review of immigration decisions are best addressed by undoing the counterproductive elements in the administrative streamlining adopted in 2002 and pursuing reforms that will restore sound functioning of the adjudication and appeals system at the administrative level. It is bound to be more cost-effective and efficient – and more likely to promote uniformity and consistency – to assure full and fair appellate review at the administrative level, rather than having to make up for systemic deficiencies through judicial review. To the extent that litigants feel that their claims were fully and fairly heard, judicial appeals will recede, and courts will also be more likely to defer to the administrative result. Title VII of the Chairman's mark contains many promising provisions to this end, and a later amendment drafted by the Chairman but, as I understand it, not formally considered by the Committee, would introduce further improvements.

The major jump in immigration appeals to the courts of appeals derives from at least three sources.

First, a significant increase in caseload was predictable once Congress stepped up enforcement activity through significant additions to INS resources in the 1990s. Activity essentially doubled, and so did the number of immigration judges. That expansion itself was likely to bring to the courts an eventual doubling of the appellate caseload (a need not adequately factored into budget allocations for the judiciary in the wake of those enforcement enhancements), but the courts were shielded from the full impact for several years by backlogs at the BIA. When the BIA cleared much of the backlog in a burst of activity in 2002-04, a large spurt of appeals suddenly arrived at the courts. Once that backlog-clearance spurt is played out, we should see some easing of the strains, but we can still expect total numbers of appeals in a steady state at least double that of the 1990s, simply because of increased enforcement activity.

The increase in judicial appeals over the last year or so has not been a doubling, however; it has been roughly a five- or six-fold increase. This is because appeal rates have climbed from the historic level of approximately 10 percent of BIA decisions taken to federal court, up to 25-30 percent. Some of that higher rate derives from a second

factor: Congress made major and complex changes in the immigration laws in 1996 in IIRIRA, raising a host of interpretive questions. One can expect an increase in court challenges in the wake of any massive legislative change, until the new statutory provisions receive authoritative interpretation (and rulings on their constitutionality) – but that is an effect that eventually wears off. We are probably still in the midst of this settling process for the 1996 changes. (Statutory stability would contribute significantly toward eventually reducing the number of appeals.) This factor may account for some of the increase in appeal *rate*, but probably only a portion of it.

Most of the jump in court appeals derives, I believe, from profound dissatisfaction with changes in the way the BIA handles appeals, imposed in 2002. This change was done in the name of streamlining, and it involved the following:

- limiting BIA authority to review factual determinations by immigration judges;
- imposing tight time limits on consideration by the BIA
- providing that most cases would be resolved by single members of the BIA
- allowing for affirmance without opinion in a wider array of cases.

In addition, the 2002 regulations decreed a cut in the size of the Board from an authorized 23 members down to 11, to be imposed six months after the effective date of the regulations – without waiting to see whether the changes really mastered caseload pressures or adversely affected the quality of decisions.

Experience has shown that these regulations, designed, as I understand it, by assistants to the Attorney General with relatively little input from the BIA itself, have had most unfortunate impacts. Why it was thought that a cut in the Board size was a good idea, in the face of a massive caseload, is mystifying. That bit of staff paring – ostensibly made possible by authorizing more summary affirmances – proved to be a wholly false economy. For, in my view, these changes quickly helped trigger the higher appeal rate that has consumed so much time and energy of appellate lawyers drawn from far and wide in DOJ, with the full range of negative consequences detailed in the statement of Jonathan Cohn of the Department of Justice. Restoring the perception and reality of full and fair consideration of appeals at the BIA should eventually reduce the number of appeals to the federal courts, although the impact will not be immediate.

I certainly do not claim that the streamlining regulation was the sole reason for the appeals. There are frivolous or clearly ill-founded appeals. Other witnesses also mention the desire by aliens to delay their removal by filing an appeal, That risk is one reason why the law was changed in 1996 to eliminate automatic stays of removal throughout the pendency of judicial review. But that factor – the desire to delay removal in the hopes of developing additional equities that might allow the person ultimately to stay – operated in exactly the same fashion before 2002, in the days when appeal rates ran at approximately 10 percent. And even before 2002, the BIA had more focused ways of dealing with clearly meritless appeals in summary fashion.

The BIA itself, through a patient process initiated and shepherded by its former chairman, Paul Schmidt, had adopted an earlier streamlining regulation in 1999 that was making significant inroads on the administrative appeals backlog by 2002, without triggering significant negative effects on judicial review dockets. We should, in general, now go back to that system. It enabled the Board to deal expeditiously with weak cases, but it had a much more limited list of instances in which cases could be resolved by single members of the Board or without a full BIA opinion. It also maintained BIA authority to engage in full review of factual determinations, a power taken away in the 2002 streamlining. The Board did not use that power indiscriminately. Under a set of precedent decisions issued in the late 1990s, the Board made it clear that it would ordinarily defer to the factual findings of the immigration judge in the vast majority of cases, but it retained authority to delve deeper if there appeared to be significant problems with the immigration judge's assessment of the factual record. Occasional exercise of that factual review authority by the BIA can be quite useful, because immigration judges will continue to handle high caseloads and will continue ordinarily to dictate their decisions at the close of the hearings. When IJ mistakes occur, it is far better for the BIA either to correct the factual conclusions, offer a sound rationale that really justifies the factual conclusions reached (if the defect is simply in summarizing the record or drawing conclusions from it), or else remand the matter because of factual mistakes that may not rise entirely to the level of "clearly erroneous," before the matter ever reaches the federal courts. (It is precisely such IJ mistakes regarding the development or analysis of factual records that now often seem to trigger harsh criticism of the administrative system by federal judges.) An independent review of the 1999 streamlining by an outside management consulting firm found that those reforms had been largely successful, were generally well received, and were having an appreciable effect in eliminating the BIA's case backlog.

I would urge that the BIA's procedures revert in most respects to the 1999 regulations. Much of section 712 in the Chairman's mark would move in that helpful direction. For example, it would limit the occasions in which single-member decisions, affirmance without opinion, or other summary disposition would be authorized. Importantly, it would also expand the size of the Board, returning (under the Chairman's later proposed amendment) to an authorized level of 23. The Committee should consider a still larger increase in Board size. Section 712 also contains other provisions, however, that raise further concerns and should not be adopted without a good deal more study of their likely impact. It is definitely important to assure the decisional independence of Board members and immigration judges in resolving individual cases, and I applaud the bill for its efforts toward that end. But the exact measures for such insulation must be carefully designed to allow for the fact that precedent decisions also may touch on delicate issues of foreign policy or national security. The changes in section 712 may go too far in disabling the Attorney General from stepping in, through a carefully structured (and infrequently used) certification or referral process, to resolve by adjudication certain overarching questions that entail both policy and law. Exact measures for appointment and removal of members also need also to be carefully scrutinized. And as indicated, I think a wider range of BIA authority to reconsider factual determinations would be advisable – though it should be sparingly employed.

In significant part the issue is resources. The most promising investment Congress could make in solving the problems that rightly motivated the Chairman's proposals to alter judicial review would be in additional resources for the immigration courts and the Board of Immigration Appeals, plus related government functions. Such augmentation is authorized in section 702 of the proposed Title VII and is supported by several of the judges testifying today – and by others who have looked closely at the unfortunate byproducts of the 2002 streamlining. This means both an increase in the size of the Board, as mentioned above, and in the staff of attorneys who assist the members in preparing the cases for decision. Permitting ample consideration and the preparation of a full opinion in the vast majority of cases would, first, reduce the number of appeals that result from litigant frustration over perceptions of insufficient Board attention to the individual's arguments. Second, it would also better assist the courts in disposing efficiently of appeals that do result.

IV. Conclusion

Although the Department of Justice was right to take steps to catch up with the BIA backlog, the administrative system took a wrong turn in 2002, with unintended consequences that have imposed significant costs on courts, the Department of Justice, and the respondents in removal cases. The Committee is rightly concerned about the problems that have resulted, but the answer, at least for now, should not be sought in consolidating appeals in a single circuit or imposing a problematic screening barrier to judicial review. I urge the Committee instead to let the regional courts of appeals address these issues through their current court management initiatives. The Congress should concentrate its attention in this realm on restoring a fully reliable system for administrative appellate review, through greater resources and other reforms, rather than introducing at this time the sharp and problematic changes implicit in sections 701 and 707 of the Chairman's mark.

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

March 23, 2006

Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510-6275

Dear Mr. Chairman:

As the Senate Judiciary Committee continues its consideration of the "Comprehensive Immigration Reform Act of 2006," I write to share the opposition of the Judicial Conference to section 701 of that proposed bill, which would consolidate all immigration appeals in the United States Court of Appeals for the Federal Circuit. I note that a similar provision has also been included in S. 2454, the "Securing America's Borders Act," introduced by Majority Leader Frist on March 16, 2006. While the judiciary is still assessing these bills, I thought it important to make the Senate Judiciary Committee and members of the Senate aware of the views of the Conference with respect to this section of the pending legislation.

Section 701 of the bill would grant the United States Court of Appeals for the Federal Circuit exclusive jurisdiction of appeals to review a final administrative order or a district court decision arising from any action taken, or proceeding brought, to remove or exclude an alien from the United States. These cases would include appeals from decisions of the Board of Immigration Appeals (BIA) and from district court decisions such as orders granting or denying petitions for a writ of habeas corpus challenging the detention of an alien. This section would increase the number of authorized judgeships in the Federal Circuit from 12 to 15 and would also authorize appropriations for fiscal years 2007-2011 for the Federal Circuit to meet its new responsibilities, including the hiring of additional attorneys.

As reflected in Recommendation 20 of the *Long Range Plan for the Federal Courts* (*Long Range Plan*) (December 1995) and in various positions adopted by the Conference over the past several years, the Judicial Conference has generally been opposed to concentrating appellate review of actions of administrative agencies and decisions of Article I courts in a single Article III court, and has preferred dispersed review in the courts of appeals for the respective geographic circuits. Recommendation 20 provides in part that "[i]n general, the actions of administrative agencies should be reviewable directly in the regional courts of appeals." While Recommendation 20 expresses a preference for review of administrative decisions in the courts of appeals instead of the district courts, it also reinforces the preference of the Conference for dispersed review of administrative decisions rather than consolidated review. This preference reflects both a concern regarding the docket pressure that consolidation would place on a single court and a recognition that individual litigants may be unfairly burdened by a system of exclusive review in a distant tribunal.

Recommendation 16 of the *Long Range Plan* also relates to the courts of appeals and provides that "[t]he federal appellate function should be performed primarily in: (a) a generalist court of appeals established in each regional judicial circuit; and (b) a Court of Appeals for the Federal Circuit with nationwide jurisdiction in certain subject-matter areas." Although the drafters of the *Long Range Plan* perceived benefits in centralized review in limited contexts, the commentary to Recommendation 16 (which explains and supplements the recommendations of the *Long Range Plan* but does not necessarily reflect the views of the Conference) makes it clear that the *Plan* did not generally endorse proposals to create new specialized or subject-matter courts in the judicial branch. Centralized review is seen as appropriate only in particular areas of the law in which national uniformity is crucial and the courts of appeals have taken significantly different approaches in applying the law, and where the subject matter is so technical that specialized expertise is necessary to render high-quality decisions. For example, the Judicial Conference was supportive of the establishment of the United States Court of Appeals for the Federal Circuit to hear appeals involving patent laws, copyright, and trademark, appeals from the Merit Systems Protection Board, cases decided by the Court of International Trade, and cases decided by the Court of Federal Claims.

While there has been a dramatic increase in the number of immigration appeals filed in the courts of appeals over the past several years, judges on the regional courts of appeals report that the problems with immigration appeals stem, not from differences among the circuits in the interpretation of the immigration statutes, but from the need to conduct a thorough review of the factual basis for the decision, a situation created when

an agency record fails to fully develop all of the issues for appellate review. Centralized review of cases in a single Article III court will not correct this problem.

No sufficient justification to support changing the status quo and shifting these cases from the regional courts to the Federal Circuit has been provided. The regional courts of appeals have developed expertise in resolving immigration cases, which may often involve substantial issues of constitutional law. These courts have worked diligently to establish court management procedures to assist them in effectively and efficiently handling these cases. These measures are enabling the courts to process significantly larger numbers of cases than in prior years.

Before consolidating immigration appeals in the Federal Circuit or in another Article III appellate court, it would also be necessary to conduct a careful analysis to determine that consolidation would not likely overwhelm the court's docket. Section 701 would significantly increase the caseload of the Federal Circuit. Although as noted earlier, the bill would authorize additional resources, such resources may be insufficient to address the significant increase in the court's docket. Inadequate resources could jeopardize the ability of that court to hear and decide those distinctive cases the court was originally created to decide. To put the situation in context, recent statistics reflect that more than 12,000 appeals from the BIA were filed in all circuit courts of appeals in the fiscal year ending September 30, 2005. In that same year, the United States Court of Appeals for the Federal Circuit received 1,555 appeals of *all types* within its existing jurisdiction.[1]

The Conference is continuing to look at other sections of the legislation that may have implications for the federal courts and the administration of justice. One section that is being closely examined is section 707 of the bill that would add a requirement of a certificate of reviewability by a single judge as a prerequisite to review of an immigration appeal by an appellate panel. (A similar provision is included as section 507 of S. 2454 and section 805 of H.R. 4437.) Although the Judicial Conference policy does not address this proposal, such a significant change calls for careful analysis to ensure that it would not interfere with the ability of the courts of appeals to manage their caseload and provide meaningful review of such cases, and would not impose an unwarranted burden on the judiciary or litigants.

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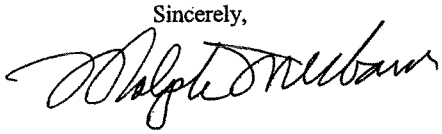
[1]The judiciary recognizes that the Comprehensive Immigration Reform Act of 2006 also includes changes to the procedures of the Board of Immigration Appeals, which may affect the quality and quantity of appeals filed in the courts of appeals from decisions of the Board of Immigration Appeals.

Thank you for your consideration of these views. The Judicial Conference is mindful that the Senate Judiciary Committee intends to complete action on this bill next week as the full Senate begins its debate on immigration legislation. Should the Conference take further action with respect to this legislation, we will provide those views to the members of the Senate Judiciary Committee expeditiously. We would be pleased to offer any assistance you deem appropriate as you consider this important issue. Please feel free to contact me at (202) 273-3000, or, if you prefer, you may have your staff contact Karen Kremer or Ralph Watkins, Counsel in the Office of Legislative Affairs, at 202-502-1700.

Sincerely,



Leonidas Ralph Mecham
Secretary

cc: Honorable Patrick J. Leahy,
Ranking Democrat, Committee on the Judiciary
Members of the Committee on the Judiciary

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

March 31, 2006

Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510-6275

Dear Mr. Chairman:

Today, the Executive Committee of the Judicial Conference, acting on the Conference's behalf, voted to oppose the certificate of reviewability provision that was included as section 707 of the "Comprehensive Immigration Reform Act of 2006," that was considered by the Senate Judiciary Committee and is also included as section 507 of S. 2454, the "Securing America's Borders Act." That provision would require that petitions for review of decisions of the Board of Immigration Appeals (BIA) be assigned to a single circuit judge and, unless that judge issued a certificate of reviewability permitting the case to be heard by a three-judge panel, the petition for review would be denied. The judge would not be authorized to issue a certificate unless the petitioner established a prima facie case that the petition for review should be granted. The Executive Committee also reaffirmed the previously stated Judicial Conference opposition to a provision in these bills that would consolidate all immigration appeals in the United States Court of Appeals for the Federal Circuit. I respectfully request that a copy of this letter, as well as the March 23, 2006 letter from the Conference, be made part of the record of the hearing scheduled for Monday, April 3, 2006.

The certificate of reviewability process raises several issues of concern. First, it would create an additional layer of review by a single circuit judge. That judge would in many cases need to conduct a full review of the case to determine whether the petitioner's burden has been met. As referenced in recent opinions from some appellate courts, the record from the immigration judge often does not provide a full description of the issues or the litigant's claims. Compounding the problem is the high volume of decisions by a

single BIA member and the ability of the BIA to affirm a decision of the immigration judge without an opinion. The result is often an administrative record that may be inadequate for judicial review, complicating the task of the circuit judge. This problem would be further compounded by the provision that the United States "shall not be afforded an opportunity" to file a reply brief until a certificate of reviewability is issued. The bills would *permit* the court to request the government to file a reply brief before issuing a certificate; however, unless the exception were to become the rule, the provision could hinder the development of important legal issues that might have been omitted from or been inadequately addressed in the petitioner's brief. The workload would be shifted from the Department of Justice to the circuit judges and court staff to conduct the research that would ordinarily be undertaken by government lawyers.

Sections 707 and 507 would also mandate how the courts of appeals are to manage their caseloads by requiring a judge to complete all action on a certificate of reviewability, including rendering judgment, not later than 60 days after the date on which the judge is assigned the petition (unless an extension is granted). As noted in our March 23rd letter, the courts of appeals have worked diligently to establish court management procedures to assist them in effectively and efficiently handling immigration cases. The provision removes flexibility and could negatively impact a judge's management of his or her docket. It is longstanding policy of the Conference to oppose the statutory imposition of litigation priority, expediting requirements, or time limitation rules on specified classes of civil cases brought in federal court beyond those civil actions currently identified in 28 U.S.C. § 1657 as warranting expedited review.

Finally, beyond the practical concerns with the provision, it could raise issues of fairness by permitting a single judge to dismiss the appeal without further review by the courts of appeals. The appellate process is designed so that litigants ordinarily are given an opportunity for three judges to review their case after being fully briefed by both sides, with the possibility of oral argument. Streamlining both the administrative and appellate review of immigration cases raises concerns about whether the process would provide a meaningful review of these cases.

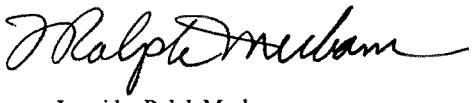
The legislation also includes a proposed increase in resources to the executive branch to litigate and review immigration cases and proposes changes in the current composition and procedures of the BIA to enhance the review provided at the administrative level. As reflected in Recommendation 9 of the *Long Range Plan for the Federal Courts* (December 1995), the judiciary has long supported efforts to strengthen the hearing and review process within administrative agencies. These proposed

administrative changes and increased resources may help address some of the problems identified by appellate judges with appeals from the BIA.

The proposed increases in resources to the executive branch and the substantive changes proposed in the pending legislation may also increase the caseload of the federal courts. Accordingly, the Executive Committee on behalf of the Judicial Conference urges Congress to include sufficient resources for the judicial branch to enable it to carry out its responsibilities in handling any increased caseload.

Thank you for your consideration of these views. We would be pleased to offer any assistance you deem appropriate. Please do not hesitate to contact me at (202) 273-3000, or if you prefer, you may have your staff contact Karen Kremer, Counsel in the Office of Legislative Affairs, at (202) 502-1700.

Sincerely,



Leonidas Ralph Mecham
Secretary

cc: Honorable Patrick J. Leahy,
Ranking Democrat, Committee on the Judiciary
Members of the Committee on the Judiciary

Statement of

Doris Meissner, Muzaffar A. Chishti, and Michael J. Wishnie
of the
Migration Policy Institute

for the hearing on

Adjudication of Immigration Cases

Committee on the Judiciary
United States Senate
Washington, D.C.

April 3, 2006

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The Migration Policy Institute is pleased to submit this statement on the proposed legislation addressing the adjudication of immigration cases.

I. Introduction

Currently, non-citizens may obtain judicial review of a final administrative order in an immigration proceeding on a petition for review in the U.S. Court of Appeals "in which the immigration judge completed the proceedings." Section 701 of the Comprehensive Immigration Reform Act of 2006 (the " Chairman's Mark") would route all review of such orders into the United States Court of Appeals for the Federal Circuit, a specialized court that hears a variety of administrative claims.

A. Summary

Since 1999, when the Department of Justice passed reforms to "streamline" administrative immigration case reviews, non-citizens facing removal have turned increasingly to the federal courts. As a result, the number of immigration cases reaching the circuit courts has increased significantly. This increase in the review of immigration cases has also shed light on the current lack of quality adjudication at administrative levels. §701 of the Chairman's Mark appears to attempt to address some of these issues.

The proposed legislation would route immigration appeals into the U.S. Court of Appeals for the Federal Circuit (the "Federal Circuit"). A number of scholars and jurists have analyzed the merits of specialized courts. Some analyses deem specialized courts superior to generalist courts for a given area of law when there is a need to develop a unified body of law, promote efficiency, and apply particular expertise to a complex body of law and facts. However, these benefits are closely mirrored by criticisms regarding the fairness and efficacy of specialized adjudication.

Adding immigration appeals to the Federal Circuit would exacerbate the current criticisms of the Federal Circuit and create new problems. While the addition of immigration cases would dramatically increase the Federal Circuit's caseload and not alleviate the current backlog, their adjudication would not benefit from the court's expertise. Furthermore, as the Supreme Court defers to the Federal Circuit more often than to other circuit courts, it is expected that there will be little oversight of power concentrated in a few appointed judges.

We recommend against routing all immigration appeals to the Federal Circuit. We also sketch out some tentative alternative proposals that might better address the current problem in the adjudication of immigration cases.

II. Background

A. Immigration appeals

In 1999 and again in 2002, faced with a growing backlog of cases, the Department of Justice (DOJ) initiated a series of reforms aimed at "streamlining" BIA review of immigration appeals. The reforms resulted in what many characterize as a rubber-stamp function. As a result, the number of petitions for review filed in the U.S. Courts of Appeals (or habeas corpus actions filed in U.S. District Courts in 1996-2005[1]) challenging a final order of removal increased significantly, creating a potential crisis of high volume as well as poor adjudicatory quality.[2]

The first wave of BIA reforms in 1999 introduced "streamlining" measures in an attempt to cut back on a growing backlog. For a very narrow class of cases, the measures permitted review by only one BIA member, rather than the normal 3-member panel, as well as the issuance of judgments without opinion ("summary affirmances").[3] In 2001 independent DOJ auditor Arthur Andersen declared the reforms an "unqualified success" in addressing the backlog.[4] Nonetheless, in 2002, Attorney General John Ashcroft issued another set of sweeping "procedural reforms," extending one-judge review and summary affirmances to the majority of the cases pending before the BIA, eliminating *de novo* review of cases, and halving the number of BIA judges from 23 to 11 members.[5] The reduction of judges was criticized as counterproductive, given the ostensible problem of an unmanageably large docket.

The reforms dramatically impacted the character of BIA proceedings.[6] Non-citizens are being denied appeals to the BIA in much higher numbers,[7] and even when granted review, they appear to be winning their appeals less frequently.[8] Furthermore, summary affirmances numbered approximately 10% of BIA decisions before 2002; since 2002 they have risen to 50%.[9] Finally, according to current estimates, an immigration case before the BIA is given only 5-15 minutes for adjudication.[10]

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[1] Judicial review of removal orders against persons convicted of certain criminal offenses was available only in habeas corpus actions from enactment of the Antiterrorism and Effective Death Penalty Act of 1996 to passage of the REAL ID Act of 2005. See INS v. St. Cyr, 553 U.S. 289 (2001).

[2] The DOJ denies the connection. Other factors that might have precipitated the high appellate load include stricter enforcement and introduction of new immigration laws that require judicial clarification.

[3] Aaron Holland, *Developments in the Judicial Branch: New BIA Rules Lead to Skyrocketing Rate of Appeal,* 19 Geo. Immigr. L.J. 615 (2005); 8 C.F.R. § 1003.1(a)(7) (2004) (original version at § 3.1(a)(7)), removed by 69 Fed. Reg. 44,903, 44,906 (July 28, 2004).

[4] Arthur Andersen & Company, Board of Immigration Appeals (BIA) Streamlining Pilot Project Assessment Report, 1 (Dec. 13, 2001) (Appendix 21, p. 140).

[5] Stephen Legomsky, *Deportation and the War on Independence*, 91 Cornell L. Rev. 369, at 375 (2006).

[6] Legal challenges to the reforms were unsuccessful. See Stanley Mailman & Stephen Yale-Loehr, *Immigration Appeals Overwhelm Federal Courts*, N.Y.L.J., Dec. 27, 2004.

[7] Before the 2002 reforms, the BIA granted appeals of the Immigration Judges' decisions in one out of every four cases. After the reforms, BIA review has declined to one in every ten case. *See* Dorsey & Whitney LLP, "Study Conducted for: The American Bar Association Commission on Immigration Policy, Practice and Pro Bono, Re: Board of Immigration Appeals: Procedural Reforms to Improve Case Management," 41 (July 22, 2003).

[8] Between 2000 and 2003, the percentage of immigrants who won their BIA appeals decreased from 9% to 6%. Solomon Moore and Ann M. Simmons, *Immigrant Pleas Crushing Appellate Courts*, Los Angeles Times, May 2, 2005.

[9] *Id.*

[10] Claire Cooper, *Immigration Appeals Swamp Federal Courts*, Sacramento Bee, September 5, 2004.

In the absence of meaningful appeals within the administrative structure, noncitizens facing removal began to turn increasingly to the federal courts. Two major problems have arisen as a result: overcrowding of the circuit courts, and, as more cases are reviewed, a growing awareness of the shortcomings and inadequacy of the administrative adjudication process.

First, the number of immigration cases has increased exponentially. In 2001, asylum and deportation reviews accounted for about 2% of the circuit courts' dockets; by 2003 they accounted for 15%. The uptick in appeals to the circuit courts has hit the Second and Ninth circuits particularly hard, based largely on the demographic composition of their jurisdictions—in these areas, immigrants' appeals have surged to 30% of the circuit courts' dockets. Steven Yale-Loehr characterizes the appeals as "swamping" the federal courts.[11] The influx of cases is "fundamentally changing the character of the second-highest courts in the nation."[12] Federal judges themselves have expressed concern at their ability to serve justice when facing such large caseloads, and have called for reform to the immigration system.[13]

Second, cases that have been streamlined at the BIA come to the federal courts without substantive administrative review or stated reason – a written opinion – explaining the grounds for affirmance. Courts of Appeals are thus forced to review the original factual findings and the voluminous IJ trial record. They have been frequently underwhelmed by the quality and sensitivity of these hearings. Various federal judges have called the decisions before them "premised on inferences, assumptions, and feelings that range from overreaching to sheer speculation,"[14] "based on a fundamental misunderstanding of the law,"[15] "arbitrary and capricious,"[16] and "intemperate and humiliating."[17] Judge Richard Posner has said that "the adjudication of those cases at the administrative level has fallen below the minimum standards of legal justice."[18]

The streamlining procedures for the BIA only perpetuate the adjudicatory shortcomings of the Immigration Judges, thereby furthering the failure of the administrative law process as a whole. As Georgetown Law School Dean Alexander Aleinikoff noted in 2003, "you are actually having meritorious cases that don't get a full hearing now until they get to the court of appeals. As a matter of administrative law, that makes no sense. You want those cases reversed early on."[19] Paul Rosenzweig of the Heritage Foundation calls the result a direct "transference of costs from the executive branch to the courts."[20]

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[11] Mailman and Loehr, *supra* note 6, at 1.
[12] Moore and Simmons, *supra* note 8.
[13] *Id.*; see comments of 9th Circuit Judge Dorothy Nelson.
[14] *Tang v. Ashcroft*, 2003 WL 1860549, at 2 (3d Cir., Apr. 4, 2003).
[15] *Tuhin v. Ashcroft*, 2003 WL 1342995, at 4 (7th Cir. Feb. 11, 2003).
[16] *Herbert v. Ashcroft*, 325 F.3d 68, 72 (1st Cir. 2003).
[17] *Wang v. Attorney General of U.S.*, 423 F.3d 260, 267 (3d Cir. 2005).
[18] *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005).
[19] Marcia Coyle, "Immigration Appeals Surge," *National Law Journal*, October 27, 2003. Available at http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1067014195642.
[20] Cooper, *supra* note 10. Rosenzweig advocates for a single national immigration circuit court, or returning

The process leaves an unmanageable and inappropriate burden to high-level appellate courts, a failure that will persist regardless of which federal appeals court hears the appeals.

B. The United States Court of Appeals for the Federal Circuit

In 1982, Congress enacted the Federal Courts Improvement Act ("FCIA"), which created the U. S. Circuit Court of Appeals for the Federal Circuit ("Federal Circuit") by merging the former U. S. Court of Customs and Patent Appeals ("CCPA") and the U. S. Court of Claims ("Court of Claims").[21] The Federal Circuit has jurisdiction based on subject matter rather than geography, adjudicating only certain fields of law.[22]

Currently, the Federal Circuit is composed of the twelve judges.[23] Appeals to the Federal Circuit are accepted from all of the nation's district courts, the U. S. Court of Claims, the U. S. Court of International Trade, and the U. S. Court of Veterans Appeals, in addition to a number of agencies, including the U. S. Patent and Trademark Office and the U. S. International Trade Commission.[24] The Federal Circuit sits in Washington, D.C., but can hold special sessions in other locations.[25]

The FCIA was a response to public dissatisfaction with the inconsistency within the appellate system in certain areas of federal law. The 1981 Senate Report on the FCIA, in expounding on the malfunction of the appellate system, stated that the federal judiciary lacked the capacity to "provide reasonably quick and definitive answers to legal questions of nationwide significance."[26] Regional circuit courts did not have binding authority over one another, so decisions on similar questions were often inconsistent. The Supreme Court, the only body with the power to review these decisions, did not have the capacity to hear all of the affected cases; the result was unsatisfactory adjudication in terms of uniformity and timeliness.[27]

The effects of inconsistent decision-making had been especially felt in the field of patent law. Prior to FCIA, forum shopping in patent case appeals was a major problem. Circuit courts of appeal had widely differing views on patent validity. Some believed patents to foster innovation, while others thought them anticompetitive, with the overriding attitude being somewhat negative towards patent enforcement.[28] The value of a patent was difficult to gauge as a result of disparate rulings on their validity, which discouraged innovation and investment.[29] Centralizing patent adjudication through

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to more comprehensive BIA hearings and eliminating immigrants' appeals to the federal appeals courts.

[21] Federal Courts Improvement Act of 1982, 97 P.L.164, 96 Stat. 25 (April 2, 1982).

[22] 28 U.S.C. § 41.

[23] S. Rep. No. 97-275, 2 (1981) (hereinafter "1981 Senate Report").

[24] 28 U.S.C..§ 1295.

[25] *Id.* § 48.

[26] 1981 Senate Report at 3.

[27] *Id.*

[28] William M. Landes & Richard A. Posner, *COLLOQUIUM: An Empirical Analysis of the Patent Court*, 71 U. Chi. L. Rev. 111, 111 (2004).

[29] Ellen E. Sward & Rodney F. Page, *The Federal Courts Improvement Act: A Practitioner's Perspective,*

uniformity of law not only stabilized these effects, but also had the effect of relieving the regional courts of appeal of an area of litigation that is complex and time-consuming.[30]

In enacting the FCIA, Congress enumerated its three main goals. The first was "to fill a void in the judicial system by creating an appellate forum capable of exercising nationwide jurisdiction over appeals in areas of the law where Congress determines there is a special need for nationwide uniformity."[31] The second legislative goal was "to improve the administration of the patent law by centralizing appeals in patent cases,"[32] and the third was "to provide an upgraded and better organized trial forum for government claims cases."[33]

Practical factors also played a role in creating the Federal Circuit. Congress perceived economic benefits in the merger of the Court of Claims and the CCPA. Both courts were located in the same building in Washington D.C., which made the merger itself much less disruptive to those involved.[34] As the courts shared many of the same resources, there was increased ease of administration and lessening of costs.[35] Finally, there was already a standing order of the Judicial Conference that allowed interchange between judges of Court of Claims and the CCPA.[36]

II. Analysis

A. Specialized courts generally

A variety of specialized courts exist in the United States, including tax, military, and bankruptcy courts, as well as the Federal Circuit. Specialized courts are often developed as attempts to adjudicate legal matters of particular complexity in a more coherent and efficient manner than generalized courts. However, though specialized courts ostensibly solve certain shortcomings of generalized courts, many practitioners, academics, and policymakers have criticized their failure to address the problems they are intended to solve and their tendency to create new problems.

1. Justifications

Specialized courts are seen as superior to generalist courts for a given area of law when there is a need to 1) bring expertise to bear on a complex body of law or facts, 2)

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33 Am. U. L. Rev. 385, 387 (1984).

[30] *Id.* at 388.

[31] 1981 Senate Report at 2; see also H.R. Rep. No. 97-312, 27 (hereinafter "1981 House Report") ("The proposed court will increase the capacity of the federal judicial system for a definitive adjudication of patent and other issues falling within its jurisdiction").

[32] 1981 Senate Report at 2; 1981 House Report at 21 (Federal Circuit "will provide nationwide uniformity in patent law").

[33] 1981 Senate Report at 2; 1981 House Report at 17.

[34] 1981 Senate Report, 4.

[35] *Id.*

[36] *Id.*

develop a coherent, unified body of law, and 3) promote overall efficiency and speed of adjudication.

Complexity. Specialization may be most appropriate for classes of cases that consistently pose complex questions of law or fact. For example, the tax code is a notoriously complex body of law, and patent litigation often requires scientific and engineering knowledge that most judges do not posses.[37] Expert judges—or judges with expert assistants—come to the bench well-versed in the body of law or fact before them, expertise that grows in continued exposure to the same area of law. Expertise in turn may yield more accurate decisions, in terms of analysis of applicable law and facts.[38] Moreover, since subsequent litigation will be directed back to their court, specialized judges will see the impact of their rulings, providing a form of feedback to interpretive or regulatory decisions that should improve adjudication.

Uniformity. Specialized courts promote a uniform national body of law, discouraging forum shopping and promoting the coherence of a given statutory scheme. The need for uniform application of customs duties drove the creation of one of the nation's first specialized courts, the Court of Customs Appeals in 1909.[39] Prior to creation of the Federal Circuit, litigants could significantly improve the chance that their patent would be held valid by their choice of forum.[40] Funneling specific types of cases into a single court eliminates the instability of law posed by disagreements by circuit courts and may promote coherence by ensuring that the component parts of a statutory scheme make sense together.[41]

Efficiency. In light of the "caseload crisis" in the federal court system, specialization may also help the courts function more efficiently. Specialization is most likely to lead to efficiency gains in two situations: 1) cases that involve a complex body of law or fact (such as tax and patent cases), and 2) a large number of fairly routine cases which must be resolved quickly (e.g. bankruptcy, FISA requests, FOIA requests). With greater expertise, specialized judges may be able to resolve disputes more quickly, without the steep learning curve of a generalist judge.[42] Removing these most time consuming cases from the federal docket may significantly reduce the caseload burden of the generalist courts. At the other end of the complexity spectrum, removing the large volume of simple but routine cases from the generalist courts could allow those judges to concentrate their efforts on particularly vexing questions of law.[43]

2. Criticisms

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[37] Richard Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. Pa. L. Rev. 1111, 1117 (1990).
[38] Henry J. Friendly, *Federal Jurisdiction: A General View* 167 (1973).
[39] Revesz, supra note 37, at 1117.
[40] Rochelle Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts,* 64 N.Y.U. L. Rev. 1, (1989).
[41] Revesz , supra note 37, at 1117.
[42] Ellen R. Jordan, *Specialized Courts: A Choice?*, 76 Nw. U. L. Rev. 745, 747 (1981).
[43] Revesz, *supra* note 37, at 1120.

Despite the benefits of specialized courts described above, Congress and the federal judiciary have generally been wary of creating such courts. The benefits are closely mirrored by significant concerns about both the efficacy and fairness of specialized adjudication.

Jurisdiction and boundary disputes. Specialization works best for issues that are separable from other areas of law. Separation has two components 1) discreteness, in that legal issues can be resolved without referring to other bodies of law, and 2) uniqueness, in that the problems encountered by the field of specialization are unlikely to be encountered in other areas.[44] Specialized courts in fields that are insufficiently unique or discrete spend a significant portion of their time, however, clarifying questions of jurisdiction, eliminating any of the efficiency gains that specialization may provide.[45] In extreme cases, these "boundary disputes" may require bifurcation of claims between both specialized and generalist courts.

"Ghettoization." Many judges and legal academics have argued that generalist judges provide benefits to the law that are lost in a specialized court. Generalist judges' exposure to many fields of law and their wider social perspective allows them to consider the effect of their rulings beyond the case at hand.[46] By focusing on a unique field of law, specialist judges may acquire "tunnel vision." For example, NYU Law Professor Rochelle Dreyfuss suggests that Federal Circuit judges have a tendency to "overvalue patent law as a means of fostering innovation."[47] The wider perspective of generalist judges encourages legal innovation through cross-fertilization between different fields of law, and helps to ensure that similar issues are treated consistently throughout the law. A related concern is that specialist judgeships may be perceived as less prestigious than generalist appointments. This diminished prestige might in turn attract a lower caliber of judge and diminish respect for the court's opinions, leading litigants to seek other means of resolution than trial.[48]

Capture and bias. The effect of bias on the composition of the court and the quality of its decisions is a significant concern for specialized courts. Courts with jurisdiction limited by subject matter may be subject to distortion in the process of selecting judges: if judges only rule on certain types of cases, viewpoints on specific issues become more important. In a classic problem of public choice theory, the impact of lobbying by interest groups on obscure appointments would be greater than for generalist judges.[49]

Specialized courts may also be subject to distortion in their standard of review. The court may tend to favor the viewpoints of an industry or agency, similar to the process by which regulatory agencies are "captured" by those they regulate. Regular

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[44] Stephen Legomsky, *Specialized Justice: Courts, Administrative Tribunals, and a Cross-National Theory of Specialization*. (New York: Oxford University Press, 1990), 26.
[45] H. Bruff, *Specialized Courts in Administrative Law*, 43 Admin. L. Rev. 329, 339 (1991).
[46] Richard Posner, *Will the Federal Courts Survive Until 1984?*, 56 S. Cal. L. Rev. 761, 780 (1983).
[47] Rochelle Dreyfuss, *Specialized Adjudication*, 1990 B.Y.U. L. Rev. 377, 379 (1990).
[48] Posner, *supra* note 46, at 780.
[49] Bruff, *supra* note 45, at 332.

players before a court are able to better tailor their arguments to individual judges, and superior knowledge of law and procedure may provide a home court advantage to regular litigants. This bias is particularly pernicious because it is difficult for outside monitors to assess, since review of a court's decisions itself requires experts.[50] A single court, typically located in Washington DC, will pose barriers to access that hinder litigants with fewer resources, simply by virtue of its location, worsening the problem of repeat players and denying access to those who lack the financial means to travel for a hearing.

Deference to specialized courts. Generalist courts, including the Supreme Court, tend to defer to the decisions of specialized courts for many of the reasons that these courts are desirable: the complexity of law or fact and the need for efficient adjudication. Given the current caseload, the decisions of specialized courts are essentially unreviewed, since conflicts between circuits signal a difficult question of law for the Supreme Court to review. The absence of dialogue among circuits circumscribes the scope of judicial thinking about a given topic, limiting legal innovation and preventing the experimental effect created by observing the effect of varied rulings across several circuits.[51]

Public legitimacy. Specialized courts toiling in obscure areas of law and regulation are rarely controversial, but they are ill-suited to subjects that involve controversial government or individual interests.[52] The ordinary tensions surrounding the role of an unelected judiciary are magnified when a single court holds sway over an entire issue or area of law, and questions of capture and bias become more acute.[53] The classic example is the Commerce Court, created in 1910 to review the decisions of the Interstate Commerce Commission and other disputes arising out of railroad legislation. The court's central position in one of the most controversial debates of the era made it a lightning rod for criticism from both reformers and railroads.[54] It was abolished just three years later, in 1913.

3. Prior Analysis of Specialized Courts

In 1973, in response to an increasing caseload in the Courts of Appeals and attendant problems, Congress created the Commission on Revision of the Federal Court Appellate System (the "Hruska Commission"). The Commission was charged with conducting the first major analysis of the federal appellate court system.[55] It discouraged the creation of specialized subject-matter courts, warning against the tendencies of specialized courts

> to develop tunnel vision; impose judges' personal views of policy; reduce incentive for thorough and persuasive opinions; dilute or eliminate regional

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[50] *Id.* at 332.
[51] Revesz, supra note 37, at 1158.
[52] Legomsky, *supra* note 44, at 28.
[53] *Id.* at 27.
[54] Dreyfuss, *supra* note 47, at 393.
[55] Commission on Revision of the Federal Court Appellate System, *The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change*, 62 F.R.D. 223, 228 (1973).

> influence; reduce the number of opinions by generalist judges; possibly dilute the quality of appointments; and be captured by special interest groups.[56]

In 1995, the Judicial Conference of the United States[57] accepted the rationale for having specialized courts for a very limited number of subjects where there is either a pressing need for national uniformity or specialized expertise. It declined to support the creation of new specialized Article III courts, stating that "in most instances the well-known dangers of judicial specialization outweigh any such benefits."[58]

B. Court of Appeals for the Federal Circuit

There are differing opinions concerning whether the Federal Circuit has achieved its goal of providing national uniformity in the complex area of patent law. According to proponents, the "Supreme Court and commentators [have] note[d] the success of the Federal Circuit in meeting both judicial substantive and procedural efficiency objectives, particularly in providing uniformity, order and predictability to a complex body of law."[59] The president of the Federal Circuit Bar Association, Robert Baechtold, stated that the Federal Circuit "has more than met the hopes of its proponents in deciding difficult issues and providing greater uniformity and predictability in the several areas of its jurisdiction."[60]

This glowing review is far from the consensus view, however. As one observer states, "[d]octrinal instability, unpredictability, intra-circuit conflict and a shift of the balance of the patent system toward the patent holder are readily demonstrable from the opinions of Federal Circuit judges."[61] Moreover, in *Holmes Group*, the Supreme Court ruled that a patent-law counterclaim was insufficient for the Federal Circuit to have jurisdiction:

> Not all cases involving a patent-law claim fall within the Federal Circuit's jurisdiction. By limiting the Federal Circuit's jurisdiction to cases in which district courts would have jurisdiction under § 1338, Congress referred to a well-established body of law that requires courts to consider whether a patent-law claim appears on the face of the plaintiff's well pleaded complaint. Because petitioner's complaint did not include any claim based on patent law, we vacate the judgment of the Federal Circuit and remand the case with instructions to

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[56] Allan N. Littman, *Restoring the Balance of our Patent System*, 37 IDEA 545, 549-550 (1997).
[57] The Judicial Conference of the United States was created in by Congress in 1922 to "serve as the principal policy making body concerned with the administration of the United States Courts." See http://www.uscourts.gov/judconf.html.
[58] Judicial Conference of the United States, *Long Range Plan for the Federal Courts*, 166 F.R.D. 49, (1995), 43.
[59] LeRoy L. Kondo, *Untangling the Tangled Web: Federal Court Reform Through Specialization for Internet Law and Other High Technology Cases*, 2002 UCLA J. L. & Tech. 1 (2002).
[60] U.S. Courts, *A Unique Circuit Court, Across the Street from the White House*, available at http://www.uscourts.gov/newsroom/uniquecircuitcourt.htm.
[61] Littman, *supra* note 55, at 552-553.

transfer the case to the Court of Appeals for the Tenth Circuit.[62]

This exclusion from the Federal Circuit of some cases involving patent law increases the dissonance in patent law doctrine between the circuits, rather than fostering its uniformity. Since cases often involve multiple types of law, mixed-law patent cases reviewed by the Federal Circuit can lead to specialized views of other areas of law that only apply in patent cases before the Federal Circuit. "Concerns were raised when the Federal Circuit developed its own interpretation of antitrust laws instead of applying regional circuits' interpretation of antitrust laws when antitrust counterclaims are raised in patent litigation."[63] Furthermore, there is evidence that even within the Federal Circuit there is lack of uniformity, as the outcome of patent cases vary according to what judges are empanelled.[64]

There is also evidence that the Federal Circuit has created a shift that unduly favors patent-holders, in an effort to protect United States business interests.[65] In a marked reversal of traditional treatment by the Supreme Court of patents as legal monopolies, the Federal Circuit "has admonished patent lawyers not to describe patents as monopolies."[66] The scope of damages awarded to patent holders has increased dramatically under the Federal Circuit.[67] Furthermore, in hearing patent-law cases involving other issues (*e.g.*, antitrust law), some have worried that the Federal Circuit favors patent rights over other rights.[68]

On the other hand, to call the Federal Circuit a specialized court is perhaps misleading. The broad range of cases it hears defies this categorization. For example, it reviews many more administrative law cases than any other circuit court.[69] Judge Plager of the Federal Circuit argued that "specialized" did not apply to the court, and refers instead to its "non-regional subject matter structure."[70] This lack of strict specialization and the increasing diversity of cases brought within the Federal Circuit's jurisdiction detracts from purported benefits of a true specialized court.

IV. Conclusion

We conclude that immigration appeals should not be routed to the Federal Circuit. Such a radical change will not address the increase in immigration appeals in the Courts of Appeals, nor will it improve the poor quality of administrative decision-making. The change, however, will likely have significant adverse consequences for the Federal

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[62] *Holmes Group, Inc. v. Vornado Air Circulation Sys.*, 535 U.S. 826, 834 (2002).
[63] Claudette Espanol, *The Federal Circuit: Jurisdictional Expansion into Antitrust Issues Relating to Patent Enforcement*, 2 Seton Hall Circuit Rev. 307 (Fall 2005).
[64] Littman *supra* note 55, at 552.
[65] *Id.*; Kondo, *supra* note 55.
[66] Littman, *supra* note 55, at 562.
[67] *Id.* at 561.
[68] Espanol, *supra* note 61, at 307.
[69] The Honorable S. Jay Plager, *A Review of the Recent Decisions of the United States Court of Appeals for the Federal Circuit*, 39 Am. U. L. Rev. 853, 861 (1990).
[70] *Id.* at 855.

Circuit and the quality of judicial decision-making in immigration cases. Importantly, other potential strategies to address the increase in federal immigration filings and the diminished quality of administrative decision-making exist and should be more fully explored.

The main impetus for consolidating immigration cases in the Federal Circuit is to relieve the regular circuit courts of their immigration caseloads. However, re-directing immigration cases to the Federal Circuit will simply swamp that court. The number of immigration cases on appeal from BIA decisions has been increasing rapidly – rising 31 percent in 2005 for a total of 11,464.[71] For the year ending September 2005, there were a total of 1,555 cases filed in the Federal Circuit.[72] Adding immigration cases to the Federal Circuit's current caseload would overwhelm the court and create an extreme bottleneck which would further backlog the processing of immigration cases.

There is no question that the present crisis in immigration adjudications would benefit from creative, informed solutions. In order to address the problem of increasing appeals of immigration decisions, it may be useful to look at the cause of the problem. In 2002, then-Attorney General John Ashcroft slashed the BIA's workload and personnel in an attempt to reduce the budget and expedite immigration case review. The unintended and immediate consequences were: the debilitation of the BIA, the proliferation of "affirmances without opinion," and the multiplication of appeals to the federal courts.[73] The Honorable Mary Schroeder, then Chief Judge of the Ninth Circuit, said of the BIA reforms, "The conventional wisdom is that the elimination of one level of review has resulted in more remands."[74] Redirecting the appeals of BIA decisions will do nothing to improve the quality of review of immigration cases or reduce the number on appeal from the BIA. Instead, reform at the BIA level or below would promise to be more successful.

Second, if proponents of adding immigration cases to the Federal Circuit's jurisdiction hope to benefit from specialized expertise of the court, the results may prove disappointing. If anyone has expertise in immigration cases, it is a judge sitting on a regional circuit court. Moreover, even if the three additional judges proposed for the Fed Circuit were appointed for their expertise in immigration law, they would hear only one-fifth of the immigration cases before the court, as cases would be allotted at random.

Third, another motive for consolidating immigration appeals in the Federal Circuit would be to provide national consistency in immigration law. But, as with mixed-law patent cases, many immigration cases also involve issues of constitutional law, criminal law, *habeas corpus* law, and other legal disciplines. This would naturally impede the court's ability to bring uniformity to immigration law. Likewise, it would lead

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[71] Administrative Office of the United States Courts, Office of Judges Programs, Statistics Division. "Federal Judicial Caseload Statistic," March 31, 2005.
[72] U.S. Court of Appeals for the Federal Circuit—Appeals Filed, Terminated, and Pending During the Twelve-Month Period Ended September 30, 2005, Table B-8.
[73] Moore, *supra* note 8.
[74] *Id.*

to the Federal Circuit developing a doctrine for the other law that effectively applies only in immigration related cases reviewed by the Federal Circuit.

Moreover, greater centralization in appellate adjudication is particularly unnecessary because the body of immigration law tends toward uniformity, in part because a majority of immigration claims originate in the Ninth Circuit, and in part because of the Supreme Court's deference to BIA interpretations of immigration legislation. As a result, the rate of intra-circuit conflicts in the area of immigration is not unusually high. Additionally, to the extent that some have raised concerns regarding forum shopping, in 1996 Congress enacted statutory limitations on venue to address this concern in the immigration context.[75]

Fourth, in several respects, intra-circuit conflicts are beneficial in and of themselves. "Divergent interpretations of federal law actually help the Supreme Court because they fully air issues before the court is called upon to decide them."[76] There is widespread recognition of the high value of this "evolutionary" process of legal interpretation.[77] Several independent benefits of inter-judicial conflicts, moreover, are particularly valuable in the immigration context. Steven Legomsky argues, "as courts adopt varying procedures to similar problems, new insights emerge and other analyses mature."[78] Although the elimination of inter-circuit conflict through consolidation of all immigration appeals in a single forum would doubtless increase efficiency, it would similarly do away with this much-valued "process of gradual evolution."

Fifth, the three newly appointed judges would be selected by the same Administration. This would lead to a concentration of power in the hands of a few judges appointed presumably for their particular viewpoint on immigration law. Added to this concentration of power and lack of diverse perspectives is a potential lack of oversight, given the Supreme Court's penchant for deferring to the Federal Circuit more than it does to other circuit courts. "[T]hrough its inaction in denying certiorari to intellectual property cases, [the Supreme Court] has permitted the Federal Circuit to become, in essence, the de facto 'court of last resort' for patent cases."[79] This may be tolerable for patent cases, but should be unacceptable for such a socially significant and controversial area of law as immigration. Additionally, the close connection between ideology and adjudication in the area of immigration law renders it particularly susceptible to bias.[80] In an area in which personal values and philosophies are particularly dispositive, maintaining the decentralized system of appellate review and preventing a single panel of judges from ideologically monopolizing the consideration of immigration disputes would seem to carry value far outweighing the benefits of more centralized arrangements.

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[75] *See* 8 U.S.C. § 1252(b)(2); Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 Iowa L. Rev. 1297, 1394 (1986).
[76] Richard L. Marcus, *Conflicts Among Circuits and Transfers within the Federal Judicial System*, 93 Yale L.J. 677, 690 (1984).
[77] See *McCray v. New York*, 103 S.Ct. 2438, 2438 (1983).
[78] Legomsky, *supra* note 73, at 1393.
[79] Kondo, *supra* note 55.
[80] Legomsky, *supra* note 73, at 1394.

Finally, the addition of other subject matter jurisdiction and review of special courts such as the Court of Appeals for Veterans Claims has already diluted the ability of the Federal Circuit to meet its potential. Bringing immigration law cases within the court's jurisdiction would greatly compound these problems. Three extra judges would hardly compensate for the enormous increase in caseload. The Federal Circuit would further lose its 'semi-specialized' status, and become more of a generalist court, or a court of many divergent specializations. Nothing about immigration cases would complement or benefit from the court's expertise in patent cases, or any of the other cases it currently hears. They would constitute a new and separate caseload for the court, which would at the very least prevent it from fulfilling one of its primary purposes: reviewing patent law cases.

The Senate should not place immigration cases in the Court of Appeals for the Federal Circuit. While the quality of adjudication at the trial level is suffering and the number of appeals to Circuit Courts has increased, simply moving these cases is not a solution. Such a move would not only fail to decrease the caseload or improve the quality of adjudication, it would be detrimental to the Federal Circuit, and to immigration law.

VI. Potential Alternatives

Although we believe the costs of diverting immigration appeals to the Federal Circuit would outweigh any potential benefits, several other potential reforms might better address the twin problems of an increase in federal immigration appeals and a decrease in the quality of administrative decision-making. Central to any successful reforms must be a commitment to enhancing the capacity and independence of the BIA (or its substitute). We sketch out these alternative approaches merely as tentative proposals, worthy of further examination and development, not as fully-formed recommendations. Because of the importance of the interests at stake and the complexity of the issues, we do not believe the Senate should move forward with the Federal Circuit or any other proposal at this time.

A. Re-staff the BIA

The most mundane but straight-forward approach would be to leave the BIA structurally unchanged, preserve review of its decisions in the regional courts of appeals, restore its judges, and add other judicial resources, such as law clerks and administrative staff. Additional resources would enable the BIA better to scrutinize IJ decisions, likely resulting both in more remands (to correct trial errors) and more written decisions (to explain the grounds for affirmance). A resource-based approach should reduce the number of immigration cases filed in the Courts of Appeals and facilitate appellate review of those cases that are filed. Further resources would also allow for the imposition of restrictions on the BIA's use of streamlining. Summary affirmances have caused higher numbers of appeals and more work for federal judges upon appeal, and as such, should be reduced to the extent possible.

B. Establish the BIA as an independent agency

A second approach would be to remove the BIA from the U.S. Department of Justice and establish it as an independent agency, on the model of the National Labor Relations Board, Federal Trade Commission, Federal Communications Commission, and others, with its decisions reviewable in the regional courts of appeals. The hallmark of the independent agencies are structural arrangements – such as appointment of commissioners for a term of years, Senate confirmation, limitations on the President's authority to remove commissioners, and rules providing that appointments shall alternate by party affiliation – that strengthen the independence of agency adjudications. With greater independence one would expect to see improved quality in decision-making.

In recent years, a range of experts and practitioners have promoted similar proposals. These experts have consistently pointed to the need to remove immigration adjudication from the oversight of law enforcement agencies in order to improve quality and impartiality in immigration adjudication. Notable proponents include the bipartisan, congressionally-created U.S. Commission on Immigration Reform, which in 1997 recommended creation of an independent agency for immigration review,[81] and the National Association of Immigration Judges, which embraced a similar idea in a 2002 position paper and subsequent Senate testimony.[82]

C. Establish the BIA as an Article I court

Congress has the constitutional authority to establish legislative, or "Article I" courts, to replace the BIA. An Article I court for immigration might be better suited to offer meaningful review of agency adjudication while still providing a necessary intermediary between the agency process and appellate review by an Article III court. Elevating the BIA from an executive agency to a legislative court would attract a higher caliber of judges and produce higher quality review of Immigration Judge decisions. An Article I immigration court would capture the benefits of specialized courts and expertise while maintaining inter-circuit dialogue and generalist review.

Under this proposal, adjudication of immigration cases would begin, as it does now, with Immigration Judges located around the country. On appeal, IJ decisions would advance to the new Article I immigration court, which could render an independent and substantive review. Judicial review of the court's decisions would be available in the regional Courts of Appeals.

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[81] U.S. Commission on Immigration Reform, *Becoming an American: Immigration and Immigrant Policy*, September 1997, 174, 179 ("To ensure that the new reviewing agency is independent and will exist permanently across Administrations, we believe it should be statutorily created"); *id.* at 178 (urging that agency be "completely independent" and its judges not "beholden to the head of any Department").

[82] National Association of Immigration Judges, *An Independent Immigration Court: An Idea Whose Time Has Come* (2002), at 8 (emphasizing importance of forum for administrative adjudications unfettered by agency control and asserting "the taint of inherent conflict of interest caused by housing the Immigration Court within the DOJ is insidious and pervasive"). The Association's president testified to the same effect later the same year. *See* http://judiciary.senate.gov/testimony.cfm?id=295&wit_id=674.

By adapting its procedures to the specific needs of immigration cases, an Article I court may be able to deal with such cases more efficiently. In addition, an Article I court could offer more flexibility and control for Congress than would an Article III court. Since Article I judges do not have lifetime appointments, the number of judges on the court could be expanded or reduced according to the demands of the time.

An Article I court could attract a higher caliber of judges than could an independent agency and would likely have greater prestige than the current BIA. The judges of other successful Article I courts, like the Tax Court and the Court of Federal Claims, are well regarded among the federal judiciary, and the courts consistently attract accomplished judges to their benches. Better judges mean better analysis, better opinions, and ultimately, better outcomes. The enhanced prestige of an Article I immigration court, and its influence on the opinions of the appellate courts could also provide incentive for better-written, more thorough opinions. Improved review can, in turn, help to stem the rising level of federal appeals by litigants who have faced inadequate adjudication at the agency level.

This proposal draws on the model provided by the current United States Bankruptcy Courts, with some structural differences that would adapt the model to the need for a consistent national immigration law.[83] By directing appeals from an Article I Immigration Court to the regional Courts of Appeals (as with the BIA at present) instead of the U.S. District Courts (as the bankruptcy courts currently do), this approach would retain the current three-tiered level of review while improving the quality of the initial stages, thereby relieving the regional courts of appeals of the inappropriate burden of extensive trial record review.

In many ways the connection between bankruptcy and immigration is intuitive. Congress' power to create Article I courts governing immigration is found in the same clause of the Constitution, which grants Congress the power "to establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States."[84] Like bankruptcy, immigration presents a large volume of cases with a need for timely adjudication. Like bankruptcy, immigration poses complex questions of law and fact that would benefit from the expertise of specialist judges. Like bankruptcy, immigration may implicate important questions from other fields of law that require the perspective of generalist judges on appellate review. Unlike bankruptcy, which incorporates state property and banking law, immigration cases primarily involve questions of federal law. A Federal immigration court is less likely to encounter boundary disputes that require bifurcation between federal and state courts.

Two possible structures for the legislative court warrant further analysis. First, Congress could establish a single legislative court, seated in Washington, D.C., to function like the present BIA; or second, Congress could provide for legislative courts

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[83] Federal district courts refer bankruptcy related claims to bankruptcy courts that sit as their adjuncts. The bankruptcy judges make proposed findings of fact and conclusions of law that are then submitted to the District Court, which enters the final order. This order is then appealable to the Court of Appeals.
[84] U.S. Const. art. 1, § 8, cl. 4.

located regionally, either as adjuncts to U.S. District Courts (as Bankruptcy Judges now sit) or as adjuncts to U.S. Courts of Appeals.

The two possible structures have different strengths. Distributing the judges of an Article I court regionally would impose fewer burdens on litigants would preserve the potential for dialogue among the circuit courts, and would promote greater independence, thereby reducing the likelihood of capture. In addition, judges in a regional system of Article I immigration courts would come to acquire expertise in relevant state laws, such as criminal laws, that often feature in immigration cases, much as Bankruptcy Judges develop expertise in the property law of their forum states.

On the other hand, a single Article I immigration court located in Washington would foster national uniformity in immigration law by centralizing intermediate decisions and providing a consistent record to regional appeals courts. A single intermediate-level immigration court would play a central role in focusing and framing the inter-circuit dialogue, by providing a common reference point for subsequent judicial analysis. A centralized immigration court would also maintain continuity with the current system, as the BIA is also a centralized body located in the Washington, DC area. It would also likely be less costly to implement than regional immigration courts.

Further study should be directed at assessing the relative merits of each option.

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STATEMENT OF CHIEF JUDGE PAUL R. MICHEL

of the United States Court of Appeals for the Federal Circuit

to the Senate Judiciary Committee

Hearing on Immigration Reform

April 3, 2006

The United States Court of Appeals for the Federal Circuit takes no position on the wisdom of enacting Sections 701 and 707 of the Chairman's Mark. In keeping with long-standing tradition, our Court has not previously sought, and does not now seek, expansion of its jurisdiction to include immigration appeals. However, neither do we seek to avoid any jurisdiction that the Congress wishes to confer. Our only goal is to adjudicate appeals fairly and efficiently in whatever areas of law the Congress assigns to the Federal Court.

As a court now receiving about 100 appeals a month, receiving 1,100 could overwhelm us within months. We lack adequate numbers of judges and also support staff and office space. We also lack the infrastructure to support greatly increasing our size, which would be required since the new jurisdiction would increase our filings by more than ten-fold. We are one of the smallest circuit courts, based on total number of staff and judges. As presently constituted, we simply cannot absorb 12,000 immigration filings per year; we keep current on our 1,500 annual filings only by very diligent efforts. Even assuming a massive increase in resources, a lengthy and difficult transition period would be required.

Of course, we would do our best to handle any new jurisdiction the Congress assigns. Certainly, our judges are very able and could quickly learn and accurately apply immigration law. The logistical challenges, however, would be immense.

I. Current Operations at the Court of Appeals for the Federal Circuit

Perhaps the most important information I can provide the Committee concerns the Federal Circuit itself -- how it is structured and how it handles its present caseload. The court has 12 active judgeship positions with one vacancy, and enjoys the part-time support of four colleagues who have taken senior status. All appeals with counsel are argued unless the parties waive oral argument. Preparation is done entirely by the judges, assisted by three "elbow" law clerks. No staff attorneys are involved. Opinions are written by the judges with assistance of law clerks, not by staff attorneys. Our 4 staff attorneys work solely on motions filed in those appeals not yet assigned to a 3-judge merits panel.

The oral arguments consist primarily of detailed questions by panel members of the parties' attorneys based on the judges' careful study of the briefs and the record on appeal. Our standard of expedition requires that we circulate opinions quickly enough that they may publicly issue not more than 90 days after argument. This goal is achieved in 90% of the appeals.

This model of appellate adjudication was the norm in an earlier era but is rare in many courts of appeals of today. Most of them now face caseloads that are massive, requiring huge staffs. Our judges feel that it is highly desirable to retain our present size

and practices. Not surprisingly, our bar and their clients, including leading corporations, enthusiastically agree.

Contrary to popular assumption, we are not a narrowly specialized patent court. Rather, patent-related cases only constitute approximately one-third of our caseload. The other two-thirds include large numbers of appeals involving veterans' claims, government personnel cases, government contracts and a variety of money claims against the government, including tax refund cases and Fifth Amendment takings cases. The combined number of veterans and personnel appeals exceeds the number of patent appeals. In all, over 50% of our appeals come from administrative courts, commissions, or boards, including the Merits System Protection Board, the Court of Appeals for Veterans Claims, the Court of Federal Claims, the departmental Boards of Contract Appeals, and the International Trade Commission. We also review all decisions of the Court of International Trade, an Article III trial court.

Our separate areas of jurisdictions share only one thing in common: the Congress determined that national uniformity was crucial. In addition, for areas such as patents and international trade, and perhaps some others, some limited expertise was thought desirable.

Reflecting the variety of our caseload, our 15 judges come from varied backgrounds. They include 2 former trial judges, several general litigators from major law firms, 4 former high officials from the Department of Justice, 3 patent lawyers and 2 former members of the staff of this distinguished Committee.

II. Innovations in the Chairman's Mark

Section 701 consolidates all immigration appeals in the Federal Circuit in place of the 12 regional circuits. While I am confident that our judges could rapidly learn the statutory law as well as the immigration caselaw of the regional circuits, as noted earlier we simply do not have the capacity for a ten-fold increase in filings. Within a few months or even sooner, we would suffer judicial breakdown. The result would be large and growing delays in all cases and the risk of inadequate attention to any individual case.

If vast increases in all our resources were promptly provided by the Congress, perhaps after a difficult transition period, which could well last more than a year or even two, we might be able to handle the combined workload. But, the increases would have to be truly vast. The number of judges might need to be increased from 12 to 18, rather than just 15 as presently provided, assuming single-judge review is retained; if not, it might have to be doubled to 24. The number of staff attorneys, presently 4, would have to be increased by more than 80, according to court staffing formulas used by the Administrative Office (AO). The number of deputy clerks, presently 20, would have to be increased by over 100, again according to the AO formulas.

In addition, a new, huge and expensive computer system would probably have to be created, tested, and then put into use. Our present computer platform was designed for a court with less than 2,000 filings. The number of people needed to do this is unclear, but our Automation and Technology Office would have to at least double in size from 8 to 16. Additional personnel would also be needed in the Administrative Services Office, Circuit Executive's Office, Library and elsewhere. Including the Chambers staff

of the new judges, the total number of additional personnel would have to be on the order of 250 to 300. Our present number is 140. We would need 400 or more. Therefore, roughly speaking, the size of our staff would have to triple.

In dollar terms, our budget, now at $24 Million annually, would have to increase at least two- to three-fold. We would also need to find, rent and secure commercial office space nearly the size of our present courthouse. Simply acquiring such space could take a year, even after funding was provided. It is not even clear that we could find sufficient space for all the new personnel at a location that would make an integrated operation feasible, particularly with paper filings in over 13,000 appeals.

In the current budget climate, it may be unclear whether the Congress would double or triple our budget to support the required tripling of our staff.

Even if all these logistical obstacles were addressed by massive new resources provided by the Congress, our method of adjudication would so change as to become unrecognizable. We would go from being the least bureaucratized court to the most heavily dominated by staff. The consequences for the quality of our work both in immigration and our present cases would surely be adverse. For one thing, oral argument would largely disappear and, it is estimated, would be available in less than 10% of the cases. For another, analysis and writing now done by judges would shift toward staff attorneys. Adequate supervision of their work might present another difficult challenge.

Some people predict the rate of filing of immigration appeals in the courts of appeals may soon decline. I do not know the reliability of this prediction. The number of cases going before judges of the Immigration Court may actually increase, if the

government increases the resources devoted to locating illegal aliens and to adjudicating their cases. Consequently, the number of appeals to the Board of Immigration Appeals (BIA) may increase. If the number of judges in these two courts is increased, their annual output will also likely increase, even if more opinions are written at the appellate stage. Therefore, it appears likely that filings in the courts of appeals may go up, rather than down, at least for several years.

Section 707 of the Chairman's Mark contains another major innovation: one-judge review for "prima facie" merit. Some suggest that great efficiency would come from such one-judge review. I see little reason for confidence, however, that this review would be quick or easy. Although I do not have experience myself with immigration appeals, I have learned from those who do that a significant portion of these cases are factually complex and difficult to assess, taking much time for staff attorneys and also judges.

At one time, our court considered a similar procedure with respect to our hundreds of personnel cases. We quickly abandoned the idea, however, because it became clear that given the time needed to adequately assess whether the case had potential merit, the panel might as well decide the merits. Otherwise, the case is studied twice. If 99% of the appeals ended at the stage of one-judge review, the added burden on merits panels would be greatly reduced. But such an outcome is not likely, and in any event, would be greeted by an outcry that the review was inherently shallow and unfair. Such a complaint might have some validity. In addition, without an opinion to explain why merits adjudication by a three-judge panel was not warranted, the

denials would look suspect to many. On the other hand, if an opinion was written for every denial by the single judge, the one-judge review process might suffer delays.

In sum, I see little ground for optimism that the nationwide immigration appeal caseload could become manageable either by rapid reduction in its size, or through the one-judge review procedure.

I agree with Judge Posner that the appeal rate from BIA decisions, which recently rose from less than 10% to more than 30%, would likely fall at least somewhat if the Immigration Court and the Board of Immigration Appeals were expanded and better equipped to do more thorough review. On the other hand, aliens awaiting deportation would still have considerable incentive to appeal the Board decision because of the likelihood of a stay of deportation. The alien could at least hope to delay his departure by a year or two and might also think he has some chance of prevailing at a court of appeals. Even those aliens without paid or pro bono representation could proceed pro se.

I am in no position to judge the current level of uniformity among the 12 regional circuits. Assuming that lack of uniformity is demonstrated as a problem, and assuming that delay is, too, I would be concerned that, while uniformity might increase with consolidation, the delays might well get worse, at least for several years of transition. If the concern is the reversal rate, I question whether, given the same BIA decisions reviewed last year, in the Federal Circuit would produce a lower reversal rate. If the concern is disparate interpretations of the immigration statutes, a reinvigorated BIA might prevent further disparities.

In conclusion, our court understands the substantial problems resulting from the flood of immigration cases now facing the regional circuits, and the difficult choices that confront this Committee and the Congress as a whole. I again wish to make clear that our court takes no position on the merits of the proposed jurisdictional provision. But if the proposal were enacted in this or some other form, our court would do its utmost to implement the wishes of the Congress and to shoulder whatever task we are asked to undertake. Although I have given the best estimates I could in one week on necessary resources, I also recognize that it is premature to delineate with precision the added resources that our court would require if given the new jurisdiction. If the jurisdictional provision is enacted, we will work with the Committee to better estimate the resource requirement, and to plan as smooth a transition as possible.

Because the Committee has received much input from other circuits' Chief Judges, other judges, the Judicial Conference and other sources, I have limited my statement to information directly concerning or affecting the Federal Circuit.

I thank the Committee for the opportunity to submit this statement.

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

March 2, 2006
BY FAX

CHAMBERS OF
CHIEF JUDGE PAUL R. MICHEL

The Honorable Arlen Specter
Chairman, Judiciary Committee
United States Senate
711 Hart Building
Washington, DC 20510

Dear Senator ~~Specter~~ Arlen:

Section 701 of the Chairman's Mark would confer immigration jurisdiction on the Federal Circuit and add 3 judgeships. Although the Court takes no position on whether such exclusive jurisdiction should be conferred, effective administration of such immigration appeals would certainly require both additional judges and supporting personnel. In addition to adding three judges, I wonder if the legislation might create the position of *Special Immigration Attorney*. Then experienced immigration lawyers could be added to the Court's staff. I would think one per active judge would be sufficient. How they would be deployed would seem a matter for internal court administration.

The added jurisdiction would increase our caseload greatly. Thus, in addition to *Special Immigration Attorneys*, perhaps the legislation should also include authority for the hiring, if necessary, of an equal number of Immigration Appellate Masters. They would exercise authority according to Rule 48 of the Federal Rules of Appellate Procedure.

I know that these resource issues are miniscule compared to other issues confronted by the Mark. Nevertheless, I thought you might like to have the Court's initial response.

Immigration jurisdiction seems generally similar to the personnel and veterans jurisdiction already exercised in our Court. With sufficient resources, I expect we could do as well with immigration appeals.

Sincerely,

Paul

United States Court of Appeals
for the Federal Circuit
717 MADISON PLACE, N.W.
WASHINGTON, D.C. 20439

March 23, 2006
BY FAX

CHAMBERS OF
CHIEF JUDGE PAUL R. MICHEL

The Honorable Richard J. Durbin
United States Senate
332 Dirksen Senate Building
Washington, D.C. 20510

Dear Senator Durbin:

I have seen a copy of Judge Posner's letter to you of March 15, 2006 concerning immigration appeals. While I have the utmost respect for him and his views, one factual matter requires clarification.

He wrote (page 2. par. 2): "The Federal Circuit is a specialized court, focusing particularly on patent cases; I cannot think of an area of law that is more remote from immigration than patents." In fact, patent – related cases make up only about one-third of our caseload. The other two-thirds largely concern federal personnel cases, veterans' benefit cases, and appeals from the Court of Federal Claims involving government contracts, tax refunds, native American land rights, military backpay, correction of military records, childhood vaccine injury, and Fifth Amendment takings. Of nearly 1,200 appeals pending at the end of last month, 401 concerned patents, 263 veterans benefits, 235 were personnel cases from the Merit Systems Protection Board and 139 came from the Court of Federal Claims. These disparate areas of jurisdiction share only one attribute: the Congress wanted national uniformity.

While I agree that patent and immigration appeals may have little in common, I suggest that the immigration cases seem comparable the personnel cases. Both tend to be fact-intensive, rife with credibility determinations and reviewed under the "substantial evidence" standard. Like immigration cases, personnel cases are often presented pro se. There is another parallel: with the creation of the court in 1982, the personnel cases were removed from the regional circuits and consolidated in the Federal Circuit.

Although certainly the Federal Circuit has a more concentrated docket than do the regional circuits, I question saying that the Court is "specialized." Indeed, the Long Range Plan of the Federal Courts, adopted in part in 1995 by the Judicial Conference of

the United States, said: (page 43, note 6) "Since the Federal Circuit has jurisdiction in only a few topical areas, it may be fairly characterized as 'subject-matter' rather than a 'generalist' court. It is not, however, 'specialized' in the sense of a tribunal limited to adjudicating a single category of cases involving relatively narrow issues." On the very same page, moreover, the commentary states the following principle: "There are, admittedly, benefits in the centralized review of certain types of cases, particularly those involving areas of law in which national uniformity is crucial and the courts of appeals have taken significantly different approaches." Later, the commentary continued: ". . . it would be preferable to consolidate in the Federal Circuit those limited categories of cases in which centralized review is helpful."

I do not know the extent to which the regional circuits have taken "different approaches" in immigration cases. I understand, however, that their reversal rates may vary substantially. In any event, the value Congress would attach to national uniformity seems to me entirely a matter within its purview.

Should Congress decide to consolidate immigration appeals in the Federal Circuit, Judge Posner is certainly correct that the Court would be "overwhelmed by the new caseload," given its present resources. The new caseload could add as many as 12,000 new appeals per year to a docket of 1,500. On the other hand, I expect that, given sufficient additional resources, the Court could dispose of the immigration appeals fairly and expeditiously, while continuing the same quality and promptness in the areas of jurisdiction presently assigned by Congress.

I hope the above is useful to you and your colleagues as you weigh the countervailing considerations bearing on the question of allocating jurisdiction.

Sincerely,

Paul R. Michel

cc: The Honorable Richard A. Posner

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

March 24, 2006
BY FAX

CHAMBERS OF
CHIEF JUDGE PAUL R. MICHEL

The Honorable Arlen Specter
United States Senate
711 Hart Senate Office Building
Washington, D.C. 20510-3802

Dear Senator Specter:

The United States Court of Appeals for the Federal Circuit takes no position on the wisdom of enacting Section 701 of the Chairman's Mark. In keeping with long-standing tradition, our Court has not previously sought, and does not now seek, expansion of its jurisdiction to include immigration appeals. However, neither do we seek to avoid any jurisdiction that Congress wishes to confer. Our only goal is to adjudicate appeals fairly and efficiently in whatever areas of law Congress assigns to the Federal Circuit.

Whether to consolidate immigration appeals, now dispersed among the regional circuits, within the Federal Circuit is an issue that has generated considerable controversy. Ordinarily, such controversy is best left to Congress and to your Committee. However, letters sent to the Committee so misrepresent our caseload and the background of our judges that they require a response. Although I know that you yourself are knowledgeable about the Court, I nevertheless write because others may be less knowledgeable and the misstatements are both gross and repeated.

One recurring charge is that the Federal Circuit consists of "specialized judges." (Dreyfuss – Koh letter, March 14, 2006, pages 1,2). The Brennan Center at New York University School of Law asserts: "the Federal Circuit currently specializes in patent cases" (March 17, 2006 "Elert"). More generally, the Dreyfuss-Koh letter, also signed by other law professors, describes us as a "narrowly focused, specialized, commercially-oriented court." (page 1) Going further, the Brennan Center's letter asserts that the Chairman's Mark "...will result in a court that is dangerously disengaged from the wider community...." (page 3) That same letter also claims that Federal Circuit judges "were selected to sit on that court because of their expertise in a completely unrelated area of the law" (presumably, patent law) (March 1, 2006 letter, page 3).

The facts are quite different. Our Court provides national uniformity in numerous areas of law where Congress has determined a need to avoid inconsistent decisions among the regional circuits. Congress designated more than a dozen such areas. In addition to patent cases, they include appeals in personnel cases (previously lodged in the regional circuits) and veterans benefit cases, as well as appeals from a wide variety of administrative boards. In fact, the Congressional committees that proposed the Federal Circuit emphasized the breadth of its

jurisdiction. For example, House Report No. 97-312 (page 19) notes that the legislation ". . . provides the judges of the new court with a breadth of jurisdiction that rivals in its variety that of the regional courts of appeals. The proposed new Court is not a 'specialized court'". Similarly, Senate report No. 96-304 (page 13) observed:

> "The Court of Appeals for the Federal Circuit will not be a 'specialized court,' as that term is normally used. The Court's jurisdiction will not be limited to one type of case, or even to two or three types of cases. Rather, it will have a varied docket spanning a broad range of legal issues and types of cases. It will handle all patent appeals, plus government claims cases and all other appellate matters that are now considered by the CCPA or the Court of Claims – cases which contain a wide variety of issues.
>
> This rich docket assures that the work of the proposed court will be broad and diverse and not narrowly specialized. The judges will have no lack of exposure to a broad variety of legal problems. Moreover, the subject matter of the new court will be sufficiently mixed to prevent any special interests from dominating it."

Contrary to what the law professors have suggested, only 1/3 of our caseload involves intellectual property. The other 2/3 covers over a dozen areas of law and includes large numbers of appeals concerning removals of civil servants and benefit claims of veterans. The former come from the Merit Systems Protection Board, which reviews all government personnel appeals nationwide; the latter come from the Court of Appeals for Veterans Claims, another administrative tribunal created by Congress.

For most of our Court's existence, the personnel cases have outnumbered the patent cases. Today, just the personnel and veterans cases constitute 50% of our caseload. Like immigration appeals, personnel appeals are fact-intensive, credibility-dependent, and reviewed under the "substantial evidence" standard. In addition, we have substantial numbers of appeals in the following areas: cases from the Boards for Correction of Military Records; military and civilian back pay cases; taxpayer refund claims; Native- American water, land, mineral, and oil and gas rights; childhood vaccine injury cases; international trade cases reviewing decisions of the International Trade Commission and the Commerce Department's International Trade Administration; and contract cases from the departmental Boards of Contract Appeals as well as the Court of Federal Claims. So many of those appeals are from administrative agencies or boards that administrative appeals are over 50% of our caseload.

We also hear civil rights cases from the Office of Senate Fair Employment Practices, the Office of Compliance (House and Senate), the General Accountability Office, Personnel Appeals Board and Tucker Act money claims against the government in a broad range of cases from the district courts, many involving civil rights and civil liberties.

Despite the assertions to the contrary made by the professors, Federal Circuit judges frequently face and decide issues of civil rights, constitutional law, agency regulation, statutory interpretation, and administrative law. Their assumption that we are a narrowly-specialized patent court is not only ill-informed, but also surprising since nearly all of our broad jurisdiction

was granted by Congress in 1982. Somehow, the law professors lack awareness of this quarter-century record.

Even worse, some of the language in their letters is not only inaccurate but also offensive. For example, they suggest that, being "exposed solely or mostly to a single narrow field of law", we may suffer "...not only tunnel vision but also an ossification of views of such judges." They also imply, contrary to the facts and to the Congressional reports cited above, that as a result of such "ossification" we are thus more likely to be "'captured' by opposing interest groups or the agency they review." (Dreyfuss-Koh letter, page 1). Such allegations cannot go unanswered.

The cited letters imply that the judges of the Federal Circuit are somehow unqualified to handle immigration appeals. It is suggested that our judges lack knowledge about equal-protection principles, constitutional due process and the limits of agency powers that arise in administrative law cases. In fact, our judges compare very favorably with those of other courts of appeals.

Not only do our judges have experience in the judicial and administrative matters described above, they also possess the following qualifications that certainly make them the equal of their colleagues on any circuit:

- 3 judges who clerked at the Supreme Court and a fourth who served as the Special Assistant to the Chief Justice; yet another argued over 80 cases before the Supreme Court;
- 4 were high ranking officials with national responsibilities at the Department of Justice: Acting Associate Attorney General, Deputy Solicitor General, Associate Deputy Attorney General, Assistant Attorney General, and Assistant to the Attorney General;
- 3 served at length as high-level staffers in the Senate, 2 on the Judiciary Committee;
- 2 previously served as trial judges, and another served as a Watergate and Koreagate Prosecutor;
- 1 was a distinguished law professor and law school dean;
- Of the 15 active and senior judges, only 3 were patent lawyers before joining the bench, and they, like their colleagues, have successfully ruled on all administrative law matters brought before our court.

Our judges attended some of the most prestigious law schools in the country, including Harvard, Yale, Columbia, Virginia, Texas, Georgetown, and George Washington. Many of our judges teach at top law schools, such as Georgetown, George Washington and Virginia, and are responsible for educating students in courses with broad subject matter such as trial practice, appellate practice and constitutional law. Several of our judges have distinguished records in private practice (where they did not specialize in patent law) at major law firms such as Jones Day and Wilmer, Cutler and Pickering (now Wilmer Hale).

Precisely because of these broad backgrounds, many of our judges have been selected by the Chief Justice to serve on committees of the Judicial Conference, including Budget, Judicial Resources, Judicial Branch, Codes of Conduct and Inter-Circuit Assignments. In keeping with their broad interests and legal experiences, the majority of our judges sit regularly

by designation of the Chief Justice with the other courts of appeals all around the country. Judges have recently sat by invitation with the 1st, 2nd, 3rd, 6th, and 9th circuits.

More than one-third of our judges have also been elected to serve as presidents of Inns of Court, including the Edward Coke Appellate Inn of Court, which counts among its members many of the most prominent Supreme Court practitioners.

It is surprising that the nature of our broad jurisdiction and the experience of our judges were somehow not understood by those who wrote to the Committee. All of this information on our court is readily available in published reports, such as the Congressional Quarterly's *Judicial Staff Directory*, and also on our Federal Circuit website, where biographies of all of our judges and a description of our jurisdiction are available 24/7.

Everyone interested in immigration cases should be able to agree that momentous policy issues are associated with the Chairman's Mark, including Sections 701 and 707. Everyone should also be able to agree that useful advice to your Committee on these issues can not be founded on mischaracterizations or inaccurate facts. Whether or not Congress ultimately decides to consolidate immigration appeals in the Federal Circuit is its choice to make based on the advice and input it receives. However, those who seek to analyze and criticize the Chairman's Mark should first meet their obligation to get the facts straight.

Sincerely,

Paul R. Michel

cc: Members, Senate Committee on the Judiciary

**Statement of Jon O. Newman, United States Circuit Judge,
Second Circuit Court of Appeals,
before the Senate Committee on the Judiciary
April 3, 2006**

Mr. Chairman, Senator Leahy, and members of the Committee: My name is Jon O. Newman. I am a United States Circuit Judge, serving on the United States Court of Appeals for the Second Circuit. I have served on that Court for 27 years and previously served as a United States District Judge in the District of Connecticut for seven and one-half years.

First, I want to thank you for the opportunity to appear before you today to discuss the pending proposals concerning the adjudication of immigration cases. There are several specific points to be made, but my basic contention is that it would be a serious mistake to remove the existing jurisdiction of the regional courts of appeals to review decisions of the Board of Immigration Appeals ("BIA") and place that jurisdiction in the Court of Appeals for the Federal Circuit.

1. The Issues Raised by Moving Immigration Cases to the Federal Circuit.

The pending provisions to move such jurisdiction to the Federal Circuit raise two distinct issues, which deserve separate consideration. The first issue is whether appeals from the BIA should be centralized in one court. If centralization is thought desirable, the second issue is which court should be used to adjudicate such appeals.

2. Centralization Is Not Required to Achieve Uniformity.

The traditional arguments for centralizing a class of appeals in one court do not apply to immigration cases. One argument for centralizing appeals in one court is to secure increased uniformity of decisions. It was the disparity of results among the regional courts of appeals in patent cases that led to the creation of the Court of Appeals for the Federal Circuit. Congress sought to end the rampant forum-shopping by litigants trying to bring their cases in circuits perceived as either pro patent or anti patent. Patent lawyers had easy opportunities to choose virtually any forum in the country for their cases. Appeals from BIA decisions arise in an entirely different context. In the first place, there is not rampant forum-shopping in immigration cases; these case may be brought generally only in the jurisdiction where the alien entered or resides. Furthermore, the circuits are not perceived as either pro alien or anti alien. The few issues on which the circuits have divided concerning interpretation of immigration statutes provide the Supreme Court with a useful airing of close questions of law, and also afford Congress an opportunity to respond to statutory conflicts as they arise.

But the more important difference between the immigration and the patent context is that the typical issue in an immigration case is whether the testimony of an applicant for asylum is to be believed, and for a reviewing court, the issue is whether a finding by an individual Immigration Judge ("IJ") that the witness lacks credibility is supported by substantial evidence. On that

recurring issue, it is not surprising that there is not uniformity, but it is illusory to think that centralization of immigration appeals will achieve uniformity with respect to credibility decisions on such fact-intensive matters. It would be equally illusory to suggest that review of all findings of fact by district judges should be centralized in one specialized court to achieve uniformity of outcomes.

3. Centralization is not Required Because of Caseload Volume.

Another argument for centralizing immigration appeals in one court is that the regional courts of appeals are currently overburdened with BIA appeals. We surely are overburdened, especially the Second and Ninth Circuits, which have experienced the major share of the increase in filings. I have little doubt that many judges of the regional courts of appeal would tell you that they would be delighted to be rid of these cases. But the personal preference of judges is not a legitimate basis for formulating public policy concerning the structure of appellate jurisdiction. We serve to adjudicate the cases that are appropriately placed within our jurisdiction, not just the cases we would prefer to hear.

In fact, the courts of appeals, especially the Second and Ninth Circuits, are making substantial progress in disposing of the enormous flood of cases that started coming to us two years ago. They came, as you know, because of a decision within the Department of Justice to have the BIA substantially clear its backlog. The BIA responded by deciding thousands of cases within a matter of

months, often by one-line orders of affirmance. The Courts of Appeals had no choice but to handle that sudden influx as best they could. Both the Second and Ninth Circuits are making significant progress in reducing the backlogs that were thrust upon them. In the Second Circuit, we have adopted special new procedures to expedite the decision of cases involving denial of asylum claims. In addition to our regular court calendar, we are assigning 48 appeals of asylum cases each week to four panels of three judges. If our current rate of progress continues, we expect to eliminate our backlog in less than three years. The flood of immigration appeals will be handled far more expeditiously by leaving them distributed among the regional courts of appeals, rather than centralizing these thousands of cases in just one appellate court.

4. If Centralization Is Desired, the Federal Circuit Is Not the Appropriate Forum.

If, despite the arguments just made, it is thought desirable to centralize immigration appeals in one appellate court, the Federal Circuit is not the appropriate court. The Federal Circuit is a specialized court hearing primarily appeals involving patents, claims against the government, and government employee personnel issues. The issue of using a specialized court for certain classes of appeals has been a controversial matter for decades. In general, the Nation has been well served by leaving the vast majority of appeals within the jurisdiction of the regional courts of appeals, on which serve a talented cadre of men and women selected in large part for the broad range of their experience.

There may be a good argument for placing some categories of appeals in a specialized court, as is currently done with all patent appeals going to the Court of Appeals for the Federal Circuit. But never in our Nation's history have we segregated in a specialized court cases involving personal liberties and human rights.

I do not question in any way the competence of the distinguished judges who serve on the Federal Circuit. But the fact is that most of them were selected, quite appropriately, for their expertise in patent law or other technical fields. As a group, these judges do not have the broad range of experiences that characterizes the judges of the regional courts of appeals. Moreover, although the Immigration and Nationality Act is a highly technical statute, most of the appeals from decisions of the BIA do not involve interpretations of that statute. Instead, the vast majority of cases now coming to the regional courts of appeals involve the issue of whether the decision of the BIA or that of an IJ is supported by substantial evidence, and in most of those cases, that issue turns on whether substantial evidence supports the IJ's finding that an asylum applicant's testimony is not credible. The regional courts of appeals have regularly been reviewing administrative agency decisions to determine if the rulings are supported by substantial evidence, and they have regularly been reviewing the findings of district judges to make the similar decision as to whether those findings are clearly erroneous. By contrast, patent cases rarely turn on issues of credibility. Thus, although the Federal Circuit no doubt could

adjudicate BIA appeals if assigned that role, such jurisdiction would be substantially foreign to the tasks they now perform, whereas it is within the mainstream of what the regional courts of appeals regularly do.

5. Centralizing Immigration Appeals in the Federal Circuit Would Overburden that Court.

Placing all of these cases in the Federal Circuit would place an intolerable burden on that Court. Judge Richard Posner has provided you with the statistics concerning the burden each judge of the Federal Circuit would have to bear. Even if the argument for placement of these cases in a centralized court were substantial, it would not be sound judicial administration policy to place such a massive volume of cases into a court of 12 members or even the 15 members called for under the pending proposal.

6. Centralization Can Better Be Achieved by Creating a - Specialized Court Manned by Currently Serving Circuit Judges.

If Congress is determined to remove these cases from the regional courts of appeals and centralize them somewhere, I urge you not to place them in the Federal Circuit, but instead to consider creating a new specialized court manned by currently sitting judges selected from the regional courts of appeals.

This approach would follow the model previously used in at least two other contexts--the so-called FISA Court and what was formerly known as the TECA Court. At the present time, Congress has authorized the Chief Justice to name eleven district judges for temporary assignment to the special court authorized to issue

warrants for electronic surveillance involving foreign intelligence, 50 U.S.C. § 1803(a), plus three district or circuit judges for temporary assignment to the special court authorized to review denials of surveillance warrants, id. § 1803(b). Some years ago, Congress authorized the Chief Justice to appoint district and circuit judges to the Temporary Emergency Court of Appeals to hear appeals from district court decisions arising under the Economic Stabilization Act. The model of a temporary court composed of sitting federal judges was also proposed in 1983 by former Chief Justice Warren Burger in his State of the Judiciary address as a device to resolve intercircuit conflicts among the courts of appeals.

Following these models, Congress could implement a system of centralized review of BIA decisions by creating a special court, manned by currently sitting circuit judges. These judges could be selected from all the circuits either at random or by appointment of the Chief Justice.

I remain opposed to routing all immigration cases to any centralized court, but a centralized court drawn from the personnel of the existing courts of appeals would be far preferable to sending all such cases to the Federal Circuit. It would use the experience of generalist judges. It would also permit flexibility in the number of judges assigned to the task, with the number fluctuating to correspond to the ebb and flow of the caseload, rather than fixed at an arbitrary number, such as the three new judges proposed for the Federal Circuit.

7. The Proposed Certificate of Reviewability Requirement is Ill-Advised.

Apart from the issue of ending all immigration appeals to the Federal Circuit, one seriously flawed aspect of the pending proposal is the use of a certificate of reviewability, issued by just one judge, as a condition of obtaining review on the merits of any appeal. Perhaps this idea was borrowed from the use of a certificate of appealability ("COA"), which is now required by 28 U.S.C. § 2253(c), for appeal from the denial of a writ of habeas corpus to challenge a state court conviction. However, there is a fundamental difference between the gate-keeping function of a COA in habeas corpus cases and immigration cases. Habeas cases have already been considered by the state court counterparts of Article Three judges through all levels of a state's judicial system and then by an Article Three federal district judge. By contrast, immigration cases, prior to review in the courts of appeals, have been considered only by immigration judges and members of the Board of Immigration Appeals. It would be an extraordinary step to authorize one federal circuit judge to cut off all appellate review of a case involving individual liberty that has not been given the consideration to be expected from the two- and usually three-tiered system of a state judicial system, followed by the decision of a federal district judge.

Furthermore, although Congress has authorized one federal circuit judge to perform the gate-keeping role for review of a district court's denial of a petition for habeas corpus, nearly all

the federal courts of appeals have required three judges to consider applications for a COA. See, e.g., 2d Cir. R. 27(b).

8. The Provisions for Additional BIA Members and Immigration Judges Are Urgently Needed.

One component of the pending proposal deserves your wholehearted support. This is the proposal to expand the number of judges of the Board of Immigration Appeals and the number of Immigration Judges. As you know, the BIA, laboring under an enormous caseload and with a reduction of its membership, has adopted a so-called streamlined procedure whereby hundreds of appeals from decisions of IJs are decided by one judge of the BIA, usually in a one-line ruling that merely says "Affirmed." The result has been a serious flaw in the normal working of the administrative process. When overburdened IJs decide their high volume of cases hurriedly with oral findings dictated into the record and then their decisions are affirmed in a one-word ruling, the courts of appeals often lack the reasoned explication that is to be expected of a properly functioning administrative process.

Providing an adequate number of IJs and BIA members would go a long way toward improving the quality of the BIA's decisional process, thereby facilitating appellate court review. It might even reduce the number of court appeals, once lawyers see that a carefully reasoned decision of a three-member BIA panel stands little, if any, chance of being reversed on a further appeal.

I do not share the view of some that the IJs as a group are doing an inadequate job. Having reviewed a large number of their

decisions, I am impressed that most of them are doing extremely conscientious and competent work. However, I have also noticed that in a few instances, the hearing conducted by an IJ falls significantly below the standards expected of a federal hearing officer, and in some of those instances, the result has nonetheless been summarily affirmed by a one-member, one-word BIA ruling. A full complement of BIA members, sufficient to provide three-member panels for all appeals, would enable the BIA to resume its place as a professional administrative agency, comparable to the other agencies of the federal government.

Of course, it will cost money to provide the necessary complement of IJs and BIA members. But Congress has properly created a review procedure for important immigration cases such as asylum claims, and justice for those availing themselves of that procedure cannot be rationed for lack of adequate funding.

* * * * *

Conclusion

In conclusion, I emphasize that many of these cases involve serious claims by victims of persecution throughout the world, who have come here at great risk to themselves and their families, seeking the protection of our law as refugees. Whether their claims are meritorious or not, they deserve consideration in a properly functioning judicial system. A fully staffed administrative procedure, subject to the current system of review in the regional courts of appeals, will assure that the standards for freedom from persecution, mandated by the Congress, are fully

and fairly implemented. I implore you not to remove these cases from the regional courts of appeals, an unprecedented move that would be antithetical to our Nation's traditional insistence on full judicial consideration of claims involving denial of liberty in appellate courts of general jurisdiction.

April 4, 2006

Senator Arlen Specter
Chairman, Senate Committee on the Judiciary
United States Senate
Washington, D.C.

Dear Mr. Chairman:

At yesterday's hearing before your Committee, the representative of the Department of Justice, Deputy Assistant Attorney General Jonathan Cohn, reported a statistic concerning the United States Court of Appeals for the Second Circuit that is seriously misleading. He reported that the median interval in the Second Circuit between the filing of a petition for review from a decision of the Board of Immigration Appeals until the judgment disposing of that petition was 26.8 months for FY 2005. The Committee should understand that the principal reason for that delay was the time that our Court waited for the Department of Justice to file in our Court a certified copy of the record. In many cases in recent years, the DOJ took more than two years to file the record in this Court, despite repeated requests for the record from our Clerk's Office.

Recently, we have finally developed with the DOJ a procedure whereby records are sent to us electronically, which substantially avoids the delay in filing records. Moreover, starting last October, our Court instituted a fast track system, whereby 12 asylum cases are being submitted to each of four panels of three judges every week, and these 48 cases per week are generally disposed of within three weeks of submission to the panel. With the system now in place, our median disposition time for FY 2006 will be much lower than in previous years. Unfortunately, one reason we still encounter delays in the disposition of some asylum cases is that the Assistant United States Attorney assigned to write a brief has asked for and received an extension of time to file the Government's brief.

The delays in prior years was primarily attributable to the DOJ's inability to timely file the record on appeal, and not to lack of expedition on the part of the Second Circuit. I hope this letter might be included in your hearing record to correct the misimpression left by Mr. Cohn's statement.

Sincerely,

s/Jon O. Newman
Jon O. Newman
United States Circuit Judge

The New York Times
nytimes.com

April 7, 2006

EDITORIAL

Don't Tamper With the Courts

The debate over immigration in Congress has surfaced quite a few bad ideas. One of them is a proposal that the Senate is considering to restrict all appeals on immigration cases to a single federal court. Separating immigration cases out in this way would skew the judicial process against immigrants and diminish the entire court system by singling out one class of people for inferior treatment. It should have no place in immigration reform.

The growing number of immigration appeals is creating a burden on the federal appeals courts. Senator Arlen Specter, the Pennsylvania Republican who is chairman of the Judiciary Committee, has proposed routing all of these appeals, which are now heard by federal appeals courts across the country, to a single court, the United States Court of Appeals for the Federal Circuit. The Federal Circuit is a little-known court — not to be confused with the United States Court of Appeals for the District of Columbia — with a limited docket that is heavy in patent cases.

Judges and law professors have been sharply critical of the proposal, at Senate hearings this week and in letters to the Senate. They rightly point out that one of the strengths of the federal judicial system is that cases are heard by judges of general jurisdiction. If the Federal Circuit became the nation's immigration appeals court, it is likely that presidents would choose judges for it based on their immigration politics, skewing the court's rulings.

After the criticism of the Federal Circuit proposal, Senator Specter expressed interest in setting up a single immigration court with judges drawn from appeals courts across the country. That idea is also flawed. Since only a small number of judges would sit on it, they, too, could be screened for their views about immigration.

Having one court handle all immigration cases is also bad because federal law evolves in large part based on "circuit splits," differences in rulings among appeals courts, which the Supreme Court resolves. A single court that heard all immigration appeals would have inordinate power to make law in this important area.

The best answer to the problem of overburdened appeals courts is overhauling the Board of Immigration Appeals, which hears the cases first. The board needs more judges, and those judges need to be made to do a better job. If the Senate took care of this, there would be no need to tamper with, and do permanent damage to, the federal appeals courts.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
P.O. BOX 193939
SAN FRANCISCO, CALIFORNIA 94119-3939

March 21, 2006

The Honorable Arlen Specter
Chairman, Senate Judiciary Committee
United States Senate
Hart Building, Room 711
Washington, DC 20510

Dear Chairman Specter:

We write to express our concerns regarding Sections 701 and 707 of your draft bill entitled "Comprehensive Immigration Reform Act of 2006." These provisions would strip our court, and all other regional federal courts of appeals, of jurisdiction over immigration appeals from any final agency order or district court and place exclusive jurisdiction in the United States Court of Appeals for the Federal Circuit. This change threatens to take away many immigrants' ability to obtain meaningful judicial review before being subjected to a most important deprivation of liberty—removal from this country. We urge you to withdraw these provisions.

Judges of the Ninth Circuit feel the burden of immigration appeals perhaps more strongly than any other Circuit Court of Appeals. Last year, the Ninth Circuit considered more than six thousand immigration cases—just over half of all the immigration appeals filed in Courts of Appeals throughout the country. But no matter how great the burden of immigration cases on this or any other court, it is outweighed by the responsibility we have as federal judges to hear these appeals and to protect the rights of immigrants to due process.

We feel this responsibility in all cases, but particularly in cases in which the immigration judges, the Board of Immigration Appeals (BIA), and judges of the Courts of Appeals must determine whether the individual asking for relief will be sent back to a country in which he or she may meet persecution, torture, or death. This grave decision requires careful attention and great deliberation. Too often,

however, we have found that at the level of the agency and the immigration judges, "the process as it is revealed . . . is one of haste, carelessness and ineptitude." *Montecino v. INS*, 915 F.2d 518, 521 (9th Cir. 1990). Our colleagues in other Courts of Appeals have been similarly discouraged by the deficiencies in our current system. *See, e.g., Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005) ("[T]he adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice."); *Wang v. Attorney General*, 423 F.3d 260, 269 (3d Cir. 2005) ("[T]he tone, the tenor, the disparagement, and the sarcasm of the [immigration judge] seem more appropriate to a court television show than a federal court proceeding."); *Alarcon-Chavez v. Gonzales*, 403 F.3d 343, 346 (5th Cir. 2005) (characterizing the decision of the immigration judge as "an arbitrary exercise of judicial fiat at the expense of a powerless alien whom the [Department of Homeland Security] had already found to have a credible fear of returning to Cuba"). Criticism comes not only from the judiciary, but from the Justice Department itself. Attorney General Alberto Gonzales recently expressed his concern regarding the handling of immigration cases at the administrative level, describing the conduct of some immigration judges "as intemperate or even abusive" and admonishing members of the Board of Immigration Appeals that each case must "be reviewed proficiently" and "insist[ing] . . . that each alien be treated with courtesy and respect." Memorandum from Attorney General Alberto Gonzales to Members of the Board of Immigration Appeals (Jan. 9, 2006).

The scope of our review of administrative decisions is limited: We must defer to the findings of the BIA and the immigration judges, and we are generally permitted to reverse the BIA only if the evidence compels a contrary conclusion. Nonetheless, the Courts of Appeals are finding that such reversals are often required. It is precisely because of the deficiencies at the administrative level that the proposals in this bill are potentially so damaging. As long as problems of this magnitude continue at the administrative level, true judicial review in the Courts of Appeals is all the more crucial, because in many cases the appeals process provides immigrants their first chance at careful, thorough review of their cases. Taking these cases from the Courts of Appeals and placing them all in one Circuit can deny vital relief to those who need it most: individuals who may face death or persecution if they are wrongly returned to their homeland.

To vest jurisdiction in one court would perhaps not be so damaging if that court had the capacity to handle the volume and complexity of immigration

appeals. We fear, however, that the Federal Circuit is entirely unequipped to deal with all the immigration appeals brought in this country. At present, the Federal Circuit hears approximately 1500 cases each year. To increase the docket by more than 10,000 cases would result in a serious decline in the attention given to each case, even with the proposed expansion of the Federal Circuit.

The Federal Circuit is impeded not only by its administrative limitations, but also by its narrow expertise. Immigration law is a complex subject, requiring exercises of complex statutory interpretation in deciphering the morass of the relevant and often overlapping statutes and regulations, and some degree of empathy for the human beings petitioning for relief. The Federal Circuit has unparalleled knowledge in areas such as patent and trademark law. It has no judicial experience with matters of immigration, nor with habeas corpus, civil rights, or criminal law, issues that are raised in many of the immigration appeals we hear. Nor is the Federal Circuit prepared to handle complex questions of fifty states' criminal laws that inevitably arise in immigration appeals—not to mention that any vision of this provision creating uniformity in the application of our national immigration laws is inevitably undermined by the simple fact that immigration appeals involve a heavy dose of state law questions. Moreover, judges on the Federal Circuit will address the issues raised in immigration appeals solely from the perspective of immigration. We benefit not only from the expertise we have developed in grappling with immigration cases and confronting the changes in immigration law that have been enacted over the years, but also from our adjudication of questions of law in the broad range of cases before us. Breadth of perspective is a unique and crucial feature of judicial review of agency decisions, and one that would be rendered obsolete by Section 701.

The bill further impedes immigrants' access to real judicial review by requiring petitioners, under Section 707, to obtain a "certificate of reviewability" from a single judge of the Federal Circuit within sixty days to secure the appeal. Failure to receive this certificate within that time period results in an automatic dismissal of the case. This provision results in a perverse system whereby an immigrant's appeal will be dismissed by default unless a single judge chooses to move forward on it. If the judge chooses not to act, or simply fails to act, the petition is denied and any stay is dissolved. Not only would this provision prohibit many would-be petitioners from ever pursuing their appeals, but the dismissal of the petition would be the decision of one judge determining whether

the appeal was worthy of a hearing, rather than of a three-judge panel with an unconditional obligation to decide the petition. This provision would undercut the ability of immigrants to obtain real judicial review.

We are mindful of the need for improvement in our broken immigration system. How improvement is to be achieved presents complexities that cannot be helped by a quick fix. It is crucial that persons facing removal from this country are given the opportunity to appeal the decisions of overworked, understaffed agencies and to present their claims to judges with broad experience in deciding the issues of constitutional law, criminal law, and habeas law that invariably arise in immigration appeals. We urge you to hold hearings that will allow for more careful and thorough consideration of how the judiciary can better handle immigration appeals. We ask you to consider the severe consequences that would be wrought by the current proposal.

Sincerely yours,

John T. Noonan, Jr.
United States Circuit Judge

Kim McLane Wardlaw
United States Circuit Judge

cc: The Honorable Patrick J. Leahy
The Honorable Orrin G. Hatch
The Honorable Edward M. Kennedy
The Honorable Charles E. Grassley
The Honorable Joseph R. Biden, Jr.
The Honorable Jon Kyl
The Honorable Herbert Kohl
The Honorable Mike DeWine
The Honorable Dianne Feinstein
The Honorable Jeff Sessions
The Honorable Russell D. Feingold
The Honorable Lindsey Graham
The Honorable Charles Schumer
The Honorable John Cornyn
The Honorable Richard J. Durbin
The Honorable Sam Brownback
The Honorable Tom Coburn

March 15, 2006

United States Senate
Washington, DC 20510

Dear Senator,

On behalf of the more than 750,000 members and activists of People For the American Way, we write to express serious concerns over measures contained in Senator Specter's proposal on immigration reform currently being marked-up in the Senate Judiciary Committee. Although attempting to reform problematic areas such as family reunification, this bill, as currently drafted, will erode due process protections and punish hard working individuals, without offering a realistic solution to fixing our broken immigration system. We strongly urge you to support the thorough, realistic, humane, and enforceable proposals included in the Secure America and Orderly Immigration Act (S.1033). Introduced by Senators John McCain (R-AZ) and Edward Kennedy (D-MA), Secure America is true comprehensive immigration reform legislation that will keep our economy strong, the nation safe, and families united.

Our current immigration system is in chaos. Outdated and unrealistic visa allocations, and rigid arbitrary caps preventing family reunification, have created an unjust environment which encourages illegal entry into the U.S. and endangers non-citizens and citizens alike. This enforcement-only system has generated a record number of deaths in our deserts, exploitation of workers, an extensive cottage industry for fake documents, and billions of dollars squandered in ineffective enforcement.

Ultimately, this enforcement-only strategy has led to an estimated 12 million undocumented immigrants in the U.S., living in the shadows of our society, with no opportunity to earn legal status. **We desperately need a new, realistic, balanced approach that recognizes the contributions of hard-working immigrants and rewards and encourages legality.**

However, as currently drafted, Senator Specter's proposal does not offer that balanced solution. Senator Specter claims that the immigration proposal he introduced in February 2006 attempts to split the difference between the various immigration proposals under consideration. Unfortunately, the Specter proposal fails to include critical provisions of the McCain/Kennedy bill and tilts considerably towards an unworkable, punitive enforcement bill with no path to earned citizenship for hard-working immigrants and with serious due process and judicial review concerns.

For example, this proposal would:

- **Severely limit judicial review.** This bill would limit the judicial review over decisions made by the Department of Homeland Security (DHS) irrespective of whether the decision is based on factual or legal errors. Among the types of decisions as to which review would be limited are decisions to deport an individual or the denial of a citizenship application made by officers in DHS. Judicial review in these instances affects the most basic of cherished rights we expect in the U.S. The denial of this review removes a critical check to the potentially overreaching decisions of the executive branch, decisions that Judge Posner has characterized as having "fallen below the minimal standards of legal justice."

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- **Radically alter the current jurisdiction of U.S Courts of Appeals to hear immigration appeals by funneling all immigration cases to the Federal Circuit.** Immigration law is complex and varied, and pulls from a variety of fields of law, including constitutional law, criminal law, rules of statutory construction and interpretive presumptions, and habeas corpus. Under Article III of the Constitution, Federal judges appointed to the courts of general jurisdiction are able to obtain the vast and varied experience necessary to fairly mete out justice to the immigrants who are in the U.S. Senator Specter's proposal will strip the general Article III courts of appellate jurisdiction and funnel all immigration cases to the Court of Appeals for the Federal Circuit, a specialized court of appeals that primarily hears intellectual property, veterans' benefits, and other specialized cases. This transfer of approximately 11,000 new immigration cases each year to the Federal Circuit will also likely overwhelm the court's docket and risk these immigration appeals either being delayed or failing to receive the thorough attention necessary. The proposal would also create a "certificate of reviewability" which would empower a single judge with the discretion to decide whether an immigration appeal can be heard at all. This radical shift in jurisdiction will threaten to deny immigrants balanced, thorough, and expeditious review of their cases, a review that tradition has afforded and justice demands.

- **Retroactively apply new penalties for immigrants.** For the sake of expediency, an individual who relies on existing definitions and penalties on the books at the time of an incident may plead guilty to an act that carries no immigration consequences. However, this proposal changes the rules in the middle of the game and assigns new immigration penalties retroactively to those crimes. In other words, for immigration purposes, settled expectations on existing law would become illusory, and the individual could face mandatory detention, permanent removal and a bar to all relief for minor indiscretions that carried no such consequences at the time a plea was entered. This is fundamentally unfair and inconsistent with the most basic tenets of justice.

- **Provide for the indefinite detention of immigrants.** This proposal would give DHS the power to detain immigrants for years, even indefinitely, without any meaningful determination that they pose a danger to the community or are flight risks. This would undermine due process and effectively overturn the critically important Supreme Court case of Zadvydas v. Davis, which stands for the principle that under current federal law, people in this country may not be detained indefinitely at the discretion of the executive branch.

- **Criminalize immigration status of vulnerable immigrants**. This proposal would make felons out of refugees, asylum seekers, victims of domestic violence or abuse, and trafficking victims. These vulnerable individuals often have no control over their situation or what documents are presented to immigration officials on their behalf.

- **Expand the types of offenses which can be classified as an aggravated felony.** Aggravated felony convictions bring severe penalties, which include mandatory detention, permanent banishment, denial of judicial review, and ineligibility for any type of immigration relief. "Aggravated felony" is a term of art in immigration law that increasingly lacks all connection to the common understanding of that phrase. To qualify as an "aggravated felony" in the immigration laws the crime need not truly be either "aggravated" or a "felony". It includes minor state misdemeanors such as shoplifting that often don't involve a single day of jail time. Under the bill's expanded definition of an aggravated felony, for example, an individual who omits information on his/her immigration applications or uses false passports to flee persecution could now be treated as an aggravated felon.

In stark contrast to this punitive and unbalanced approach, the McCain/Kennedy Secure America legislation provides a realistic solution to our immigration crises by providing:

- Clear legal channels, proper vetting, meaningful protections, and available temporary visas for future workers and their families to enter the country
- Incentives for undocumented immigrants already working and residing in the U.S. to register, pay a penalty and clear a pathway to earn citizenship
- The ability for families to reunite with loved ones on a timely basis by eliminating unrealistic quotas
- Pragmatic enforcement provisions that target smugglers and lawbreaking employers
- Programs that allow more immigrants to learn English and prepare for citizenship

America's need for immigration reform cannot be satisfied by Senator Specter's partial solution to a sweeping crisis. We urge you to support the measures included in the McCain/Kennedy comprehensive immigration reform package to make America safer and stronger.

Sincerely,

Ralph G. Neas
President

Tanya Clay
Director, Public Policy

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
219 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60604-1805

CHAMBERS OF
RICHARD A. POSNER
CIRCUIT JUDGE

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RICHARD_POSNER@CA7.USCOURTS.GOV

March 15, 2006

VIA FACSIMILE (202/228-0400)

Honorable Richard J. Durbin
United States Senate
332 Dirksen Senate Building
Washington, D.C. 20510

Dear Senator Durbin:

I am writing in response to your inquiry concerning my views of the judicial-review provisions of Senator Specter's proposed "Comprehensive Immigration Reform Act of 1006." Senator Specter's bill is hundreds of pages long and covers a wide variety of issues relating to the regulation of immigration. My comments are limited to two provisions of the bill, sections 701 and 707, which deal with judicial review of removal (deportation) orders, and to two other sections that deal with the Immigration Court and the Board of Immigration Appeals (sections 702 and 712).

At present, after a removal order by a judge of the Immigration Court is affirmed by the Board of Immigration Appeals in the Department of Justice, the alien can petition for judicial review in the federal court of appeals for the circuit in which the hearing before the immigration judge was held. As a result of recent increases in the number of these petitions, the Second and Ninth Circuits have been swamped with petitions. Other circuits have also experienced increasing filings, but of lesser magnitude.

Senator Specter's bill proposes to alleviate the burden on the courts of appeals in two ways. First (section 701), all petitions for review would have to be filed in the U.S. Court of Appeals for the Federal Circuit, in Washington, D.C.; that court would have exclusive jurisdiction over petitions to review removal orders, and the number of judgeships on the Federal Circuit would be increased from the present 12 to 15 to

enable the court to dispose of the petitions (at present, the Federal Circuit has no jurisdiction over such petitions). Second (section 707 of the bill), all petitions for removal would initially be referred to just one judge of the Federal Circuit, who would decide whether the petition had any merit. Only if he decided that it appeared to have merit would he issue a certificate of reviewability authorizing the court to review the petition. If he denied the certificate, that would be the end; there would be no further review of the petition.

Speaking with the greatest respect for Senator Specter's effort to alleviate what has become a significant burden on particular courts of appeals, I believe that the proposal in his bill is not a sound solution to the problem. The transfer of jurisdiction over petitions for review from the twelve regional courts of appeals to the Federal Circuit would disserve the judiciary and the immigrant community. The Federal Circuit is a specialized court, focusing particularly on patent cases; I cannot think of an area of law that is more remote from immigration than patents. No doubt the judges of the Federal Circuit can become knowledgeable about immigration law; but they will be overwhelmed by the new caseload. At present, about 1,500 cases are filed each year in the Federal Circuit, divided among 12 judges, which translates into a caseload of 125 cases per judge. The annual number of petitions to review removal orders is more than 12,000, which under Senator Specter's proposal will be divided among 15 judges, or approximately 820 per judge. The total number of cases (1,500 + 12,000 = 13,500) per judge would be about 900. That would be an unsupportable load.

The provision for certificates of reviewability will reduce the burden somewhat, as one judge rather than three judges will be reviewing most cases. But the provision is independently undesirable, because workload pressure will prevent the judges from giving more than cursory attention to the petitions. Certificates of reviewability will be denied in many cases in which the petition has merit.

It is tempting to suppose that most petitions for review are frivolous, designed only to postpone the inevitable day of removal. The experience of my court has been different. In a recent opinion that I wrote for a unanimous panel, I noted that in the preceding year my court (the Seventh Circuit) had reversed 40 percent of the petitions for review that we had decided on the merits. *Benslimane v. Gonzales*, 430 F.3d 828 (7th Cir. 2005).

The higher the reversal rate, the more petitions for review are filed. Only by bringing down the reversal rate can the flood of petitions be staunched. The reversal rate can be brought down only by more effective filtering by the Board of Immigration Appeals, to which appeals from removal orders go in the first instance. If the Board was consistent in reversing erroneous orders, many fewer petitions for review would be filed in the courts. The number would be less because many of the meritorious cases would already have been resolved in the immigrant's favor by the

Board, because the reasons for affirming the immigration judge in those cases that were affirmed would be explained in full, and because the immigration bar would know that since the Board was filtering out the meritorious cases and giving good explanations when it affirmed a removal order, there was little chance that the Board would be reversed by the court when the Board decided that a case was not meritorious. The Board's problem is that it is overwhelmed by appeals and thus cannot do an effective filtering job. Its 11 judges receive almost 43,000 appeals a year, or almost 4,000 per member—a crushing workload.

In another provision of Senator Specter's bill (section 712), the number of members of the BIA is set at 15. This is a step in the right direction, but it does not go far enough. Fifteen board members cannot handle the appeal load; 43,000 appeals divided by 15 equals almost 3,000 appeals per member. For that matter, the immigration judges, whom the Board reviews, are overwhelmed too (215 judges handle some 300,000 removal cases a year), which is a principal reason why so many of their decisions are erroneous, and the bill would increase the number of immigration judges by less than 10 percent (section 702(b)(3)(A).

The only just and effective way of alleviating the burden of immigration appeals on the federal courts of appeals is by greatly augmenting the decisional capacity of the Immigration Court and the Board of Immigration Appeals. That should be the focus of reform focused on judicial review of removal orders. Funneling all petitions for judicial review of such orders to the Federal Circuit and authorizing single judges of that court to deny petitions without further review are neither just nor effective solutions.

Very truly yours,

Richard A. Posner

March 15, 2006

The Honorable Arlen Specter
Chairman, Senate Judiciary Committee
United States Senate
Hart Building, 711
Washington, DC 20510

Dear Chairman Specter:

We are retired judges of the Courts of Appeals who write to express our deep concern about a provision in the Chairman's Mark of the "Comprehensive Immigration Reform Act of 2006" that would direct all immigration appeals to the United States Court of Appeals for the Federal Circuit and eliminate the role of the regional courts of appeals in such cases. While we understand the need for grappling with what is perceived as a caseload crisis in some federal courts of appeals, we believe that it is unwarranted to take such a radical step without careful scrutiny and study. While some of the reforms you propose in the administrative review process may relieve some of caseload pressures that courts currently face, the concentration of all appeals in immigration appeals in a specialized court in Washington is not likely to do anything to alleviate caseload pressures.

Our principal concern is that the proposal is at odds with the Federal Judicial System's long-standing strong presumption in favor of the use of Article III appellate courts of general jurisdiction. We believe that this tradition should not be departed from without serious deliberation and substantial justification. As former appellate judges, we value and endorse the longstanding view that judges benefit from an immersion in many different bodies of the law. We believe that immigration appeals raise of an array of issues, the consideration of which is enhanced by exposure to those issues in other types of cases. For example, immigration appeals may concern broad questions of constitutional law, due process, equal protection, human rights conditions in foreign countries, criminal law, family law, administrative law, rules of statutory interpretation and habeas corpus. The Federal Circuit's current specialized docket does not include the generalist menu of issues that are so integral to the adjudication of immigration cases.

It also appears that moving all new immigration appeals to the Federal Circuit would add more than 11,000 cases to its docket annually and would present many daunting challenges. For example, the court would be confronted with the need to establish precedents in many areas of immigration law, would need to consider cases previously remanded under the law of the regional courts of appeals, would be confronted with potentially conflicting circuit standards, would need to establish procedures and staff for processing the volume of cases, and would need to master the intricacies of immigration law and related matters. There is a substantial risk that these demands will result in great cost, delay and confusion.

We also believe it is premature to enact Section 701 before the kinds of changes to the Board of Immigration Appeals envisioned by the Chairman's Mark of the Comprehensive Immigration Reform Act of 2006 are enacted. Much of the recent increase in immigration appeals appears to be attributable to the changes in the Board of Immigration Appeals ("BIA") adopted in 2002. As a result, the size of the Board was dramatically reduced and the current "affirmance without opinion" process was adopted. The Chairman's Mark of the Bill includes provisions designed to improve the quality of administrative decision-making and to require reasoned decisions by the BIA, and to improve the quality and training of Immigration Judges.[1] We urge that these changes be given a chance to work before the presumption in favor of generalized courts is abandoned.

Finally, we also note concern that the proposal to create a new "certificate of reviewability" system for immigration appeals warrants further study. Under the provision, Section 707 of the Chairman's Mark of the Bill, a single judge would function as gatekeeper in every case and be required to render a decision under a 60-day deadline. Given Section 707's potential to erode access to judicial review, we urge that it be withdrawn for further study.

For all these reasons, we urge that sections 701 and 707 be deleted until they can be subjected to appropriate hearings at which judges and other experts can express their views and until an adequate assessment can be made of the costs and benefits of placing all immigration appeals into a single specialized appellate court.

We understand that this legislation is proceeding under a tight time-schedule. Thus we five write now, expecting that other retired Court of Appeals judges will express similar views later.

Respectfully,
/s/ John J. Gibbons
/s/ George C. Pratt
/s/ H. Lee Sarokin
/s/ Patricia M. Wald
/s/ William A. Norris

cc: Members of the Judiciary Committee

[1] Notably, Attorney General Gonzalez also recently announced a comprehensive review of the immigration judges to respond to concerns about the conduct of some judges. Memorandum from the Attorney General to Immigration Judges dated January 9, 2006. The Attorney General stated that "there are some [judges] whose conduct can aptly be described as intemperate or even abusive and whose work must improve."

United States Senate
Committee on the Judiciary

Hearing on:
"Immigration"
Monday, April 3, 2006, at 10:00 a.m.
Senator Dirksen Office Building
Dirksen 226
Washington, D.C. 20510

Written Testimony of
John M. Roll
United States District Judge
District of Arizona
Evo A. DeConcini U.S. Courthouse
405 W. Congress, Suite 5190
Tucson, Arizona 85701-5053

INTRODUCTION

I enthusiastically support the concept of all appeals from the Board of Immigration Appeals ("BIA") being consolidated in the Federal Circuit Court of Appeals. Consolidation of BIA appeals in the Federal Circuit would result in national standards being applied in these cases. It would also benefit the Ninth Circuit, which presently has over 6,500 BIA appeals on its docket.

HAVING BIA CASES HEARD BY A SINGLE CIRCUIT COURT IS SOUND POLICY

Currently, Board of Immigration Appeals (BIA) cases are heard by a number of federal circuit courts, with the largest proportion heard by the Ninth Circuit.

It has been proposed that BIA appeals be consolidated for review by the Federal Circuit Court of Appeals.

If these appeals were to be referred to the Federal Circuit for consideration, a more uniform national case law would likely develop in this area.

Consolidating all immigration appeals before the United States Court of Appeals for the Federal Circuit will produce a level of consistency and uniformity currently absent in the way federal appellate courts approach immigration appeals. Given the enormous volume of immigration appeals currently pending before the circuit courts, we cannot continue to allow cases to be resolved under different standards of review, or different interpretations of the substantive law.

For example, depending on your geographic location, there are varying levels of deference given to an Immigration Judge's finding of fact and adverse credibility determination. There are currently over 12,000 immigration appeals pending before the federal circuit courts; an immigration judge's finding of fact in one geographic location should not be reviewed with a different standard than an immigration judge's finding of fact in another geographic location. This problem was highlighted in the Ninth Circuit case, *Kaur v. Ashcroft*, 379 F.3d 876 (9th Cir. 2004) (Tallman, J., dissenting). Another more substantive example would be to look at the law regarding the retroactive application of § 241(a)(5) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1231(a)(5). Section 241(a)(5) is the reinstatement provision of the INA; it provides that a prior order of removal may be reinstated against an alien who has illegally re-entered the United States. It also bars such alien from applying for any form of relief under Chapter 12 of Title 8. Seven circuits, including the First, Third, Fourth, Fifth, Eighth, Tenth, and Eleventh, have all held that

§ 241(a)(5) applies retroactively, thereby allowing the government to reinstate a prior deportation and exclusion order of aliens who happened to unlawfully reenter the United States before the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. In comparison, both the Ninth and the Sixth Circuits have held that § 241(a)(5) does not apply retroactively.

Finally, there is another important issue that has raised differing views among the circuits. This issue is whether an alien-parent, who does not personally have a well-founded fear of persecution, may derivatively seek asylum based on the possible persecution of the alien's United States-citizen child. The Seventh Circuit, in *Oforji v. Ashcroft*, 354 F.3d 609 (7th Cir. 2003), denied such a claim. Nevertheless, under Ninth Circuit case law, there is support for such an argument. *See Abebe v. Gonzales*, 432 F.3d 1037 (9th Cir. 2005); *Tchoukhrova v. Gonzales*, 404 F.3d 1181 (9th Cir. 2005).

Adjudicating immigration appeals before one court will strengthen jurisprudence in this area of the law and produce consistent standards applied uniformly nationwide.

Furthermore, the Federal Circuit would unquestionably soon have an expertise in addressing these appeals, unmatched by any other circuit.

Depending upon whether all pending BIA appeals are transferred to the Federal Circuit or only future BIA appeals, the impact on the two circuits with the largest number of BIA appeals would be quite apparent. For example, the Ninth Circuit has over 6,500 BIA appeals currently pending before it. The Second Circuit Court of Appeals has another 2,000 BIA appeals on its docket.

Although some opposition to this proposal has been based on the argument that the Federal Circuit, in Washington, D.C., is inaccessible to litigants and attorneys, the Federal Circuit can sit at any location in the United States where any of the various circuit courts are authorized to sit. 28 U.S.C.§ 48. Federal Circuit panels could sit regularly in the busiest cities.

The Ninth Circuit Court of Appeals copes with the enormous number of BIA appeals through the use of staff attorneys. Certainly the Federal Circuit could utilize similar resources.

Obviously, additional judgeships would be needed for the Federal Circuit. No referral of BIA cases should commence until such judgeships are provided for.

In addition to such consolidation serving sound public policy, another important benefit would be derived therefrom. The Ninth Circuit Court of Appeals, which is currently

suffering from a staggering caseload, would benefit by the removal of BIA appeals from its docket.

THE CONSOLIDATION OF BIA APPEALS IN THE FEDERAL CIRCUIT WOULD GIVE THE NINTH CIRCUIT MUCH RELIEF

It is undeniable that the Ninth Circuit's population and caseload are vastly disproportionate to those of all other circuits.

Caseload.

The Ninth Circuit currently has pending nearly 17,000 appeals. Although the Ninth Circuit is but 1 of 12 geographical federal circuit courts, it has 28% of all pending federal appeals. (See Attachment A).

Consolidation of BIA appeals in the Federal Circuit, including pending cases, would reduce the Ninth Circuit's caseload by over 6,500 cases.

At the end of September 2005, there were 6,583 filed appeals from the Board of Immigration Appeals in the Ninth Circuit out of a total of over 16,000 filed appeals. (See Attachment B). If the Ninth Circuit were to schedule oral argument for these appeals as they are filed, it would overwhelm the circuit and cause needless delay in other important pending appeals. Direct criminal and habeas corpus claims in which the petitioner is imprisoned are time sensitive matters that also require efficient resolution. Appeals of preliminary injunctions also must be handled in an expedited manner. The Ninth Circuit is running out of resources to effectively handle over half the immigration appeals of this nation while still providing prompt and just adjudication of the cases which make up the rest of its docket. Transferring BIA appeals to the Federal Circuit would not only allow these immigration appeals to be more effectively and efficiently resolved, but it would free the Ninth Circuit to concentrate on appeals in other matters where delay also jeopardizes the rights and freedom of parties to those appeals.

Decisional Time.

According to the latest statistics from the Administrative Office of the U.S. Courts, unquestionably as a result of the enormous caseload, the Ninth Circuit is now dead last in decisional time, when measured from the time of filing of notice of appeal to disposition. This is, of course, the only time period of importance to litigants. The Ninth Circuit is 2 months slower than the next slowest circuit in decisional time using this measurement. (See

Attachment C).

Population.

The Ninth Circuit presently contains over 58 million people. This represents one-fifth of the population of the United States. The Ninth Circuit has 27 million more people than the next largest circuit. (See Attachment D). This vast population unquestionably contributes to the Ninth Circuit's disproportionate caseload.

Judgeships.

Because of the confluence of an enormous circuit population and circuit caseload, the current Ninth Circuit has 28 authorized active circuit judgeships and is in need of at least 7 more. The next largest circuit has 17 active circuit judgeships; the average circuit has less than 13 active circuit judgeships.

With 7 more authorized active circuit judgeships, the Ninth Circuit would have twice as many judgeships as the next largest circuit and nearly three times as many judgeships as most other circuits.

Limited en banc.

Because the Ninth Circuit has so many judges, it, alone of all federal circuits, must sit en banc with fewer than all active circuit judges. Until this year, 11 active circuit judges participated in "limited" or "mini-" en banc hearings. When the Commission on Structural Alternatives for the Federal Courts of Appeals ("White Report") was issued on December 18, 1998, it commented that few en banc cases were closely decided. (White Report, at 35). However, that is certainly no longer the case. Since the White Report was issued, more than 1/3 of all Ninth Circuit en banc decisions have been by 6-5 or 7-4 margins.

The recent change in Ninth Circuit rule, resulting in 15 active circuit judges now sitting "en banc," is still 13 less than the number of authorized active circuit judges for the Ninth Circuit. Former U.S. Supreme Court Justice Sandra Day O'Connor wrote to the White Commission in 1998 that an en banc hearing with less than all active circuit judges participating could not serve the purpose of a full en banc hearing. (See Attachment E).

Reversals by Supreme Court.

In 1998, U.S. Supreme Court Justice Antonin Scalia wrote to the White Commission, pointing out that the Ninth Circuit is the most reversed circuit and the most unanimously reversed circuit. (See Attachment F).

Since the White Report was issued, the Ninth Circuit has continued to be the most reversed circuit. Perhaps even more strikingly, since the White Report was issued, the Ninth Circuit has been unanimously reversed nearly 60 times. (See Attachment G). Most of these cases were never heard en banc by the Ninth Circuit.

Post-White Report increase in population and caseload.

While the Ninth Circuit now has nearly 17,000 pending appeals and decides the law for a population of 58 million people, when the White Report was issued in 1998, the Ninth Circuit's caseload was about 8,600 appeals and the population in the Ninth Circuit was 51,453,880. (White Report, at 27, 32).

CONCLUSION

At the present time, public policy commends a consolidation of BIA appeals in the Federal Circuit. Thank you for the opportunity to present my comments to you regarding these very important measures.

MARY M. SCHROEDER
CHIEF JUDGE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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March 31, 2006

The Honorable Arlen Specter
Chair, Senate Judiciary Committee
711 Hart Building
Washington, D.C. 20510
via facsimile 202-228-1229

The Honorable Patrick J. Leahy
Ranking Member, Senate Judiciary Committee
433 Russell Senate Office Building
Washington, DC 20510
via facsimile 202-224-3479

Re: Senate Judiciary Committee Hearing
April 3, 2006, "Immigration"

Dear Chairman Specter and Senator Leahy:

I write to express concerns about Chapter 7 of the "Comprehensive Immigration Reform Act of 2006" which is the subject of a hearing before your Committee on Monday, April 3, 2006. I also write with respect to constructive portions in the bill that would provide much needed resources to the immigration courts and related agencies.

I regret that my judicial duties prevent me from appearing in person. This letter is written in my individual capacity. Neither our Court of Appeals nor our Ninth Circuit Judicial Council has had an opportunity to discuss these issues in depth and neither has taken an institutional position. The Judicial Conference of the United States has, however, recently addressed Chapter 7 and its expressed opposition to placing immigration appeals in a specialized Article III court. The JCUS Committee on State - Federal Jurisdiction is chaired ably by District Judge Howard McKibben of Nevada. As the JCUS points out, in its letter of March 23, 2006, "the Judicial Conference has generally been opposed to concentrating appellate review of administrative agencies in decisions of Article I Courts in a single Article III Court, and has preferred dispersed

review in the Courts of Appeal for the respective geographic circuits." The letter goes on to point out that such a preference "reflects both a concern regarding the docket pressure that consolidation would place on a single court and a recognition that individual litigants may be unfairly burdened by a system of exclusive review in a distant tribunal." I agree with these views.

The Ninth Circuit, along with the Second Circuit, has been particularly hard hit by the sheer increase in numbers of appeals from the Board of Immigration appeals over the last few years. Our own numbers have gone from approximately 900 immigration appeals in 2001 to more than 6500 in 2005, an increase of about 700 percent. The percentage increase in the Second Circuit has been even higher, and Chief Judge Walker and I have talked together frequently on this subject.

Section 701 of the bill, at first blush, may seem attractive in that it would appear to reduce the Ninth Circuit's caseload significantly and allow our judges more time to handle the other appeals that come before us. As Judge Walker so ably pointed out in his letter of March 23, 2006, the problems facing the Second and Ninth Circuits in particular, represent only one aspect of the overall problem, and may well be caused by dysfunction at the earlier stages of the process.

Additional resources are sorely needed at the Immigration Courts, the Board of Immigration Appeals, the Office of Immigration Litigation, and the Executive Office of Immigration Review. Section 702 of the bill recognizes this need and allocates additional resources for the Department of Homeland Security, the Department of Justice Offices of Immigration Litigation and United States Attorneys, and increases the number of immigration judges by fifty. Section 712 increases the number of members of the Board of Immigration Appeals to fifteen. How these numbers were derived at is not clear to me and I do have some question of whether 15 members of the Board of Immigration Appeals are sufficient to provide an adequate level of administrative review in the more than 40,000 cases that come before it.

As you know, the Attorney General of the United States has recently undertaken a comprehensive review of the Immigration Courts system. That review is to "include the quality of work as well as the manner in which it is performed and encompass both the Immigration Court and the Board of Immigration Appeals." (January 9, 2006 memorandum from the Attorney General to the members of the Board of Immigration of Appeals and the Immigration Judges). Judges of our court met approximately ten days ago with representatives of the Department of

Justice who have been tasked by the Attorney General to do this review. Although much of the discussion centered around deficiencies in the level of administrative review currently provided by the BIA, we also discussed, as an alternative to Justice Department review of IJ decisions, the creation of an Article I court for immigration appeals, with an eventual review of its decisions in the regional circuits. The Tax Court provides a model for this approach. Another suggestion was the creation of an Immigration Appellate Panel based along the lines of Bankruptcy Appellate Panels.

To depart so drastically and so abruptly from well accepted principles of federal jurisdiction along the lines proposed in Section 701 would undoubtedly create new and different problems for the federal judicial system. It would also contradict long-standing judicial conference policies that have worked well. I respectfully suggest that this is an area in which all three branches of government have an important stake, and that your Committee await the recommendations of the Attorney General of the United States before adopting any definitive alteration of federal jurisdictional policy.

I also urge for your consideration the March 21, 2006 letter of Circuit Judges John T. Noonan and Kim McLane Wardlaw, of our Court. It contains a very thoughtful consideration of these issues. Again, I regret my inability to appear at the hearing because of my court schedule. I would be happy to discuss these matter further with you or your staff.

Sincerely,

Mary M. Schroeder
Chief Judge

United States Court of Appeals
for the Ninth Circuit
P.O. Box 31478
Billings, Montana 59107-1478

Chambers of
SIDNEY R. THOMAS
United States Circuit Judge

TEL: (406) 657-5950
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March 31, 2006

The Honorable Arlen Specter
Chair, Senate Judiciary Committee
711 Hart Building
Washington, D.C. 20510

The Honorable Patrick J. Leahy
Ranking Member, Senate Judiciary Committee
433 Russell Senate Office Building
Washington, DC 20510

Re: Comprehensive Immigration Reform Act of 2006

Dear Chairman Specter and Senator Leahy:

I write in connection with the proposal pending before the Senate Judiciary Committee to designate the Court of Appeals for the Federal Circuit as the only court authorized to hear petitions for review of final orders of removal in immigration cases. I speak only for myself, and not for our Court. I urge the Committee not to adopt such a proposal, but rather to establish a commission to study the entire immigration adjudication system.

Vesting the Federal Circuit Court of Appeals with exclusive jurisdiction over immigration cases would have a profound effect on entire judicial system. Under current staffing formulas, it would require the addition of almost 200 employees to the Federal Circuit and would require the lease or construction of a massive new facility. Further, the addition of such an enormous caseload would adversely affect the Federal Circuit's adjudication of its present workload, especially patent cases. Careful study is required before making such an enormous structural change.

First, more accurate information is needed to determine the probable appellate caseload. The well known increase in the appellate immigration caseload has been offered as one of the primary justifications for the jurisdiction transfer. However, whether the increase in caseload is temporary or not remains open to question. The surge in volume of immigration appeals was caused primarily by the Attorney General's decision to clear the 56,000 case backlog before the Board of Immigration Appeals in a period of a few months. The BIA has reported that it is has reduced its backlog to 29,000 cases, indicating that, while the courts can expect continued volume for the next several years, the volume of immigration cases should decrease as the BIA becomes current in its case processing. Recent statistics bear this out. The rate of filing of petitions for review of the decisions of BIA has been declining. For example, the Second Circuit Court of Appeals has noticed a 9% decrease in petitions for review this year. The Real ID Act may also have an effect in decreasing immigration caseload. The fact that immigration caseload is likely to decrease seems probable.

In short, one cannot predict with any assurance that the large spikes in immigration volume will continue over the next decade. More careful analysis is required to ascertain the level to which immigration caseload will ultimately stabilize before making any decisions on whether to make significant structural alterations.

Second, careful thought must be given to the most effective structural design. In the Ninth Circuit, we have discovered that the best case management of this specialized area is through intensive staff review, prior to judicial involvement. The reason is that immigration relief is procedurally complex. Many petitioners fail to comply with procedural requirements; and many others file petitions over which the court of appeals lacks jurisdiction. The current statistics in our Circuit indicate that well over 80% of the immigration petitions for review are resolved through centralized staff review. Less than 20% of the cases are ultimately presented to Ninth Circuit judges during the normal oral argument calendars. This statistic underscores the critical function of experienced and sophisticated court staff in handling these cases, and the implementation of a well-designed structure for administering the appeals. The Federal Circuit is not equipped for this major undertaking at present and study is required to make sure that the processing delays and other procedural problems in immigration cases are not compounded by the implementation of a poorly-designed processing system.

Third, transferring appellate jurisdiction does not solve the basic infirmities of the present system. The key problems are not with federal appellate court adjudication, but with the administrative structure. Reorganization of the administrative adjudication process would solve many of the present problems and, in all probability, reduce the number of cases on appeal significantly.

Finally, adding 12,000 new immigration cases to the Federal Circuit docket would inevitably have a deleterious effect on the other cases committed to its jurisdiction. Delays in patent adjudication would have a chilling effect on the development of our vital technologies and innovation. Before proceeding with a major restructuring of the business of the Federal Circuit, careful study should be made on the probable effect of such a transfer on the other cases on its docket.

The stakes are quite high. Any structural change will affect the judiciary for decades. Before proceeding with any precipitous jurisdictional change that well could have a calamitous effect on the effective adjudication of immigration cases and patent cases, I urge the Committee to authorize and establish a study commission to examine the entire system of adjudication of immigration cases.

I thank the Committee for its consideration of these matters.

Sincerely,

Sidney R. Thomas
United States Circuit Judge

Statement of Chief Judge John M. Walker, Jr.

Of the United States Court of Appeals for the Second Circuit to the Senate Judiciary Committee

April 3, 2006

Chairman Specter, Senator Leahy, and members of the Judiciary Committee, I thank you for the opportunity to appear before you today. The United States Court of Appeals for the Second Circuit, of which I am the Chief Judge, has federal appellate jurisdiction from district courts and administrative agencies in New York, Connecticut, and Vermont. I appear before the Committee today in my individual capacity; I do not speak for the court.

I appreciate the Committee's hard work on the very difficult issues related to immigration reform. I also appreciate that the Chairman and the Committee have turned to the impact of proposed legislation on the adjudication of immigration disputes both at the administrative level and in the courts of appeals. The Second Circuit is one of the two courts of appeals, the other is the Ninth Circuit, that is most affected by the increased volume of immigration appeals.

Beginning in 2002, my court began receiving immigration

appeals in very large numbers, as the Bureau of Immigration Appeals ("BIA") in the Department of Justice undertook to clear its backlog. What we thought was a one-time bubble has turned into a steady flow of cases, in excess of 2,500 a year and about a 50% increase in our total annual filings. The great majority of these cases are asylum cases.

To deal with this backlog, in October 2005 my circuit instituted a Non-Argument Calendar ("NAC") for asylum cases. It runs parallel to our Regular Argument Calendar ("RAC"). We are adjudicating forty-eight cases a week on the NAC and are doing it with three judges on each case. In the six months it has been in effect, the NAC is reducing our backlog, and we expect to eliminate it in about four years. At the same time, we are assuring the parties that their case is receiving the court's full attention. In this regard, I would like to commend publicly all of the judges of the Second Circuit for their hard work in adjudicating these cases and particularly Circuit Judge Jon O. Newman, who was the principal architect of the NAC procedure.

I want to specifically address certain aspects of Title VII of the Chairman's proposed bill, which would alter the current mechanisms for judicial review by the courts of appeals from decisions of Immigration Judges and the BIA. As you know, at present the BIA in the Executive Office for Immigration Review

("EOIR") in the Department of Justice reviews the decisions of individual Immigration Judges located throughout the nation. If the alien is ordered deported by the Immigration Judge, and the BIA affirms the order, the alien may seek further review in the court of appeals within whose jurisdiction the Immigration Judge rendered the final decision in the case. The Second Circuit is second only to the Ninth Circuit in immigration petition filings. According to recent figures, the Second Circuit receives about 21% of the more than 12,000 petitions for review filed nationwide, second only to Ninth Circuit.

The Principal Reason for the Immigration Backlog is the Lack of Resources at the Department of Justice

First, in my opinion, the principal reason for the current backlog in the courts of appeals and the reason that higher-than-expected numbers of cases are remanded are a severe lack of resources and manpower at the Immigration Judge and BIA levels in the Department of Justice. The 215 Immigration Judges are required to cope with filings of over 300,000 cases a year. With only 215 Judges, a single Judge has to dispose of 1,400 cases a year or nearly twenty-seven cases a week, or more than five each business day, simply to stay abreast of his docket. I fail to see how Immigration Judges can be expected to make thorough and competent findings of fact and conclusions of law under these

circumstances. This is especially true given the unique nature of immigration hearings. Aliens frequently do not speak English, so the Immigration Judge must work with a translator, and the Immigration Judge normally must go over particular testimony several times before he can be confident that he is getting an accurate answer from the alien. Hearings, particularly in asylum cases, are highly fact intensive and depend upon the presentation and consideration of numerous details and documents to determine issues of credibility and to reach factual conclusions. This can take no small amount of time depending on the nature of the alien's testimony.

The BIA faces similar substantial pressures. The BIA currently has eleven members and faces nearly 43,000 filings per year. For the BIA to keep current on its docket, even with streamlining so that the disposition is by a single judge, each judge must dispose of nearly 4,000 cases a year - or about 80 per week - a virtually impossible task. As a circuit judge, I have reviewed hundreds of these petitions for review, and I can say that the factual records on appeal are frequently substantial, with hundreds of pages of testimony and related material. In addition, the BIA is supposed to rule on questions of law raised by the petitions. One of my court's problems with the BIA is that it rarely seems to adjudicate the outstanding legal issues

in a case, no doubt because the judges lack the time to do so. If the BIA were not so pressed, it could properly play its role of providing uniform national rules of law in these cases.

I therefore strongly support a substantial increase in the numbers of Immigration Judges and BIA members. The proposal to add four members to the eleven on the BIA to create a 15-member court is a step in the right direction, but it is too little. I think at least thirty BIA judges are needed. And this is a step that could be taken right away at modest cost. Also, I believe that it is necessary that the number of Immigration Judges be doubled. Adding resources at the Immigration Judge and BIA levels will also reduce the percentage of cases that are remanded by the courts of appeals for further work by the Immigration Judge or the BIA. Currently 20% of our cases are remanded; in the Seventh Circuit the percentage is 40%. As these administrative judges have more time to spend on each case, the quality of adjudication will improve, and the need for remands will drop.

Related to the matter of adequate resources for Immigration Judges and BIA functions within EOIR is the question whether EOIR itself should be transferred from the Department of Justice into a stand-alone agency to foster judicial independence. I see little to commend this proposal. Administrative adjudications

are by definition administrative and not possessed of the independent character of Article III adjudication. Separating EOIR from the Department of Justice would not resolve its resource problems; it could be expected to increase them. And it would deprive the agency of the much-needed supervision it receives from the Attorney General who is working hard to improve the agency's standards of adjudication. The courts are currently cooperating with the Justice Department to improve agency adjudication by offering educational resources, and the Department has seen to it that EOIR is cooperating with the courts in promptly transmitting records electronically to the courts of appeals. This important relationship would, I believe, be disrupted by a transfer of EOIR from the Department of Justice.

Transfer of Judicial Review to the Federal Circuit

Section 701 of the Chairman's original bill would transfer petitions for review out of the regional courts of appeals and send them to the United States Court of Appeals for the Federal Circuit, located in Washington, D.C. With all due respect, I believe that consolidating court of appeals review in the Federal Circuit is undesirable for the following reasons:

- It will do nothing to improve the performance and productivity of Immigration Judges and the BIA, which

is the core problem in immigration adjudications and which can only be addressed by additional resources.

- It will swamp the Federal Circuit with petitioners, reducing the time for careful consideration, delaying dispositions, and exacerbating the backlog.
- It will run counter to the firmly accepted idea of relying on generalist judges to adjudicate disputes and the policy of the Judicial Conference disfavoring specialized courts.
- It runs the risk of politicizing the review of a group of cases by an Article III court, affecting the reputations not only of the Federal Circuit but of the judiciary as a whole.
- The benefits of having appeals heard in the community where the parties are located will be lost.

Consolidating Article III review in the Federal Circuit will do nothing to improve the performance of the BIA or Immigration Judges, which is the core problem in immigration adjudications and the principal reason for the backlog. Rather, it seems to me that consolidating all review in the Federal Circuit would slow the process of review even further.

At present, every circuit judge in the country, with the exception of those on the Federal Circuit, is available to review

immigration petitions. Considering only the judges of the Second and Ninth Circuits, which are responsible for 74% of all petitions for review, there are seventy federal judges available to dispose of these cases. Even with the proposed expansion of the membership of the Federal Circuit under section 701, fifteen judges would be responsible for the more than 12,000 petitions for review.

The Federal Circuit's total docket is presently only about 1,500 cases per year. Even with the gatekeeping provisions in the Chairman's bill, the judges of the Federal Circuit would be overwhelmed, especially when not enough is being done to improve the quality of the decisions of the Immigration Judges or the BIA. While I cannot speak for others, I have little doubt that members of the specialized bar of the Federal Circuit - for instance, the patent bar - are intensely concerned that their highly specific, specialized cases will take a back seat to immigration review as the fifteen judges of the Federal Circuit cope with the massive addition of 12,000 immigration cases each year to their 1,500 case docket.

The Judicial Conference on numerous occasions has opposed the specialization of the Article III judiciary in favor of using generalist judges to decide cases - a system that has served our nation well throughout its history. Just last Friday, the

Executive Committee of the Conference confirmed that position and opposed consolidating immigration appeals in the Federal Circuit. The use of a specialized court for immigration matters raises the possibility that members of that court would be selected on the basis of their tendency to rule in certain ways in immigration cases. At present, with the exception of the Federal Circuit, the members of the federal judiciary are generalists. We rule on the cases that happen to reach us. For the most part, judges are not appointed to decide a specific class of cases. This fact ensures that the judiciary's members are selected on the basis of overall merit and learning in the law and not based on any specific prediction concerning the outcome they would reach in a particular kind of case. However, under the proposal, the overwhelming majority - 90% - of the docket of the Federal Circuit would be immigration appeals. Even if done with the best of motives, the appointment and confirmation of judges to the Federal Circuit would tend to focus on outcomes: how the nominee would be inclined to rule in immigration matters. Should this occur, the prestige of the Federal Circuit would be impaired, as would the perception of impartiality that is so critical to the public's favorable view of the judiciary as a whole.

There is also a benefit to having the circuit courts deciding these petitions in the court closest to the petitioner

and the community. There is a level of trust in the outcome, even if it is unfavorable to the alien petitioner, that such proximity engenders. And it is also more convenient to litigants.

The Single-Judge Gatekeeping Provisions

I am also troubled by the provisions of the proposed bill that provide that one judge decide whether the petitioner is entitled to court of appeals review. Currently, even under the more efficient NAC procedure of the Second Circuit, each alien's petition receives the attention of three judges. But with the hastily assembled administrative records that we are seeing, single-judge gatekeeping review would diminish the quality of review these cases receive, and it would not appreciably speed the process because these cases are so fact intensive that the same staff attorney support would be required as today. Moreover, the provision requires that the gatekeeping judge act only upon the petitioner's brief. Even when the appeal lacks merit, as most do, that fact often does not become obvious until the government files its brief. In sum, my opinion is that any seeming efficiencies based on single-judge review are not worth the sacrifice in judicial scrutiny by three judges.

Conclusion

I thank the Chairman and the members of the Committee again

for the opportunity to discuss this important issue. I thank Chairman Specter especially for proposing his bill and bringing to light the issues faced by the federal courts in dealing with the immigration docket. In my view, the single most effective way to improve the functioning of judicial review of immigration proceedings is to give the Department of Justice adequate resources to handle its caseload. It is not reasonable to expect the BIA and Immigration Judges to perform their jobs effectively in their present situation. Until a sufficient number of Immigration Judges and BIA members are in place, the backlog is likely to continue and to grow, no matter which court is responsible for deciding petitions for review. The present structure of immigration review is not at fault, and the solution does not lie in changing it. Rather, those responsible for its implementation need to be given sufficient resources to do their job.

I thank the Chairman and the Committee again for their time.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
157 CHURCH STREET
NEW HAVEN, CT 06510-2030

CHAMBERS OF
JOHN M. WALKER, JR.
CHIEF JUDGE

(203) 773-2181
FAX (203) 773-2179

March 23, 2006

The Honorable Arlen Specter
United States Senate
154 Russell Senate Office Building
Washington, DC 20510

The Honorable Patrick J. Leahy
United States Senate
433 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Specter and Senator Leahy:

I write to comment on the judicial review provisions in Chairman Specter's proposed "Comprehensive Immigration Reform Act of 2006." As Chief Judge of the United States Court of Appeals for the Second Circuit, I am responsible for the operations of one of the two circuit courts most affected by the recent flood of petitions for review filed by aliens seeking review of orders of removal issued by the Board of Immigration Appeals ("BIA"). I write in my individual capacity.

As you know, at present the BIA reviews the decisions of individual Immigration Judges located throughout the nation. An alien may petition for review of the BIA's decision before the federal court of appeals within whose jurisdiction the Immigration Judge rendered a final decision. Because of the substantial number of aliens who live in the greater New York metropolitan area, my court has a tremendous volume of these petitions for review. We are receiving petitions at a rate of more than 2,500 per year.

Chairman Specter's bill proposes to alleviate the burden on the courts of appeals by transferring all petitions for review to the U.S. Court of Appeals for the Federal Circuit, located in Washington, D.C. It would also allow a single federal judge to act as a gatekeeper to decide whether the appeal should be heard. Only if that judge decided the petition had merit would a regular three-judge panel consider the alien's petition. If the judge declined to bring the petition before the panel, no further review would be available.

With the highest respect for Chairman Specter and his efforts in this difficult area, and even though his proposal would make our own work easier, in my opinion, I do not think that Chairman Specter's proposed solution is sound with regard to either having all petitions heard in the Federal Circuit or by using a single judge as a gatekeeper. First, it appears to me that the principal problem with the current system is that both the Immigration Judges and the BIA are

impossibly overtaxed. With over 300,000 filings a year and only 215 Immigration Judges, the Immigration Judges are required to dispose of almost 14,000 cases a year, which equates to nearly twenty-seven a week or more than five each business day per judge. In turn the BIA, with only eleven members, is required to review nearly 43,000 cases per year.

Given this caseload, it is little wonder that the courts of appeals are frequently required to vacate the findings of the Immigration Judge and remand the case back to the BIA. It would be truly remarkable if the Immigration Judges could function effectively under such stress. It is equally unsurprising that the BIA has been unable to police the individual Immigration Judges effectively. While Chairman Specter's bill would increase the number of BIA members to fifteen, I think at least doubling that number of BIA judges to thirty would be necessary to begin to give the BIA the resources required to do its job. Moreover, I think that twice the present number of Immigration Judges is likewise required.

Second, I oppose, as has the Judicial Conference on numerous occasions, the specialization of the Article III judiciary. As generalists, the members of the Judiciary are selected on the basis of individual merit, with no tilt toward outcomes in particular kinds of cases. It is not possible, as a practical matter, for the Senate or the President to select judges on the basis of how they would decide particular cases because no one can be certain of the issues a particular judge will be called to pass upon. However, with a specialized court, like Chairman Specter's bill proposes, there is the possibility that judges may come to be selected, not for their overall merit, but because they can be expected to rule in a particular way over the types of cases on their docket. Even the perception of such selections would be harmful to the Judiciary. In my view, both the reality and the perception of an independent judiciary is jeopardized by the possibility that its members could be selected on the basis of the outcome they are likely to reach.

Third, the proposed bill would radically increase the immigration docket of the Federal Circuit. At present, every circuit judge in the country, with the exception of the Federal Circuit, is responsible for a portion of immigration petitions for review. Counting only the Second and Ninth Circuits, those with the most substantial immigration docket, there are 70 federal judges available to hear petitions for review. Even after increasing the size of the Federal Circuit as the bill proposes, there would be only fifteen judges available to hear the entirety of the petitions for the whole country. The backlog would inevitably continue to grow and, in doing so, would attract even more appeals as petitioners seek to benefit from the delays in disposing of their cases.

Lastly, as Chief Judge of the Second Circuit, I can report that we are making substantial progress in the disposition of these petitions for review. With the institution of a non-argument calendar for asylum cases, we are presently making significant reductions in our immigration backlog and expect to eliminate it within about four years' time. Moreover, we are reducing our backlog with three Article III judges reviewing each and every petition for review, rather than the abbreviated analysis by a single judge provided for in the proposed bill. If the Department of Justice were given adequate resources so that the Immigration Judges and the BIA were able to invest the appropriate amount of time and energy in their cases, I believe we could eliminate our backlog even more quickly, as the numbers of meritorious petitions for review decline and the need for remands decreases.

I agree with Chairman Specter that the reduction of the federal courts' immigration backlog is a pressing problem and one in need of a prompt and effective solution. However, reassigning petitions for review to the Federal Circuit and allowing their disposal by only one judge will neither reduce the backlog more efficiently, nor protect the aliens' entitlement to adequate review. Indeed, the reverse is likely. I firmly believe the most effective and sound way of addressing this problem is by allocating sufficient resources to expand the capability of the Department of Justice, rather than altering the procedures for judicial review.

Sincerely,

John Walker

JMW:klb

John M. Walker, Jr.
Chief Judge

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
157 CHURCH STREET
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CHAMBERS OF
JOHN M. WALKER, JR.
CHIEF JUDGE

(203) 773-2181
FAX (203) 773-2179

March 28, 2006

The Honorable Arlen Specter
United States Senate
154 Russell Senate Office Building
Washington, DC 20510

The Honorable Patrick J. Leahy
United States Senate
433 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Specter and Senator Leahy:

I write to comment on the provisions in Chairman Specter's proposed "Comprehensive Immigration Reform Act of 2006" that would move the Director of the Executive Office for Immigration Review ("EOIR"), the members of the Board of Immigration Appeals ("BIA"), and Immigration Judges outside of the supervision of the Department of Justice and render them removable only for cause. As Chief Judge of the United States Court of Appeals for the Second Circuit, my circuit bears a large share of the burden of handling the petitions for review that originate from decisions of the BIA and individual Immigration Judges. I write in my individual capacity.

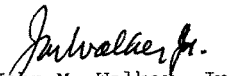
With the greatest respect for Chairman Specter's efforts to alleviate what has become a substantial burden on the federal courts, I do not think that this proposal will have the desired effect of improving the quality or efficiency of immigration adjudications. In my view, lack of adequate funds and manpower are the principal reasons for the backlog of cases before the BIA and the reason why Immigration Judges' decisions are so frequently vacated. As I have discussed in my letter of March 23, the docket of the Immigration Judges requires them to dispose of almost five cases each business day, and the BIA is required to adjudicate nearly 43,000 appeals per year. Under these kinds of pressures, neither the BIA nor Immigration Judges can be expected to devote adequate time and resources to each case.

Removing immigration review from the Department of Justice would only make it more difficult for the EOIR to receive the resources necessary for it to do its job. Moreover, in my view, it is important that the Attorney General retain his supervisory responsibilities over the EOIR. Just this January, Attorney General Gonzales issued directive memoranda to the judges of the BIA and Immigration Judges for the purpose of improving their performance, which, I have little doubt, he is following closely. While it is too early for the federal courts to see the results of the Attorney General's efforts, this kind of oversight is essential to improving the performance of the Immigration Judges and reducing the backlog of immigration cases.

In addition, the courts are engaged in a beneficial working relationship with the Department of Justice to create efficiencies in the proper adjudication of cases within the EOIR and upon Article III review. This has resulted in such innovations as the courts' making training facilities and programs available to the EOIR and the EOIR's facilitating the electronic transmission of administrative records to the courts of appeals. It would not at all be helpful to the Second Circuit if the EOIR were removed from the Department of Justice.

I share Chairman Specter's concerns, and I look forward to action from Congress that will provide the EOIR with the necessary resources to handle its burgeoning docket. I do not think, however, that a reorganization of the EOIR or moving it out of the Department of Justice is likely either to reduce the already substantial backlog or improve the quality of the BIA and Immigration Judges' decisions.

Sincerely,



John M. Walker, Jr.
Chief Judge

U.S. Court of Appeals for the Federal Circuit
Workload Calculations

April 3, 2006

Federal Circuit Caseload Comparison	**Current Caseload**	**Current Caseload + 12,000 Immigration Cases**	
		(assuming a **75%** 1-Judge Review drop off rate)	(assuming a **90%** 1-Judge Review drop off rate)
Number of cases given to 3-judge panels	**960**	**960 current + 3000 new immigration cases = 3960 cases**	**960 current + 1200 new immigration cases = 2160 cases**
Number of judges	12 (4 panels of 3)	12 + 3 new judges (5 panels of 3 judges)	12 + 3 new judges (5 panels of 3 judges)
Number of cases assigned to each judge -- Panel Cases -- 1 Judge Review	**240** --	792 800 **1592**	432 800 **1232**
Time required for each 1-Judge Review case (estimate 100-200 pgs of material)	NA	**Minimum** estimate of **1 hr/case**	**Minimum** estimate of **1 hr/case**
Maximum daily time allotted for 1-Judge Review (1JR) & Panel Caseload TO REMAIN CURRENT (assumes straight work time, and does not include any breaks, phone calls or other distractions)	**8 hours/ panel case***	8.00 hrs/day - 3.33 hrs/day for 1JR =4.67 hours 4.67 hours divided by 3.3 panel cases per day = **1.42 hours allotted to each panel case***	8.00 hrs/day - 3.33 hrs/day for 1JR =4.67 hours 4.67 hours divided by 1.8 panel cases per day = **2.6 hours allotted to each panel case***
Each Judge's Required Weekly Output TO REMAIN CURRENT	**5 panel cases begun & completed in 40 hrs**	**16.5 panel cases begun/completed in 23.4 hours** + 16.5 1JR cases completed	**9 panel cases begun/completed in 23.4 hours** + 16.5 1JR cases completed

* This includes all work required: reading briefs and background materials, working with law clerks, preparing questions, oral arguments, conferring with panel, writing opinion, obtaining consensus with panel, making changes, voting, circulating opinion, issuing opinion.

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